89-364

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC POWER & LIGHT COMPANY, et al.,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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August 30, 1989
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QUESTIONS PRESENTED

May Montana taxing authorities constitutionally impose beneficial-use property taxes on —

1. the Montana Intertie, a federal electric power transmission facility of 500 kilovolts ("kV"), which facility is designed and operated to transmit large blocks of power in interstate commerce, but at the same time exempt from such taxes lower-voltage federal transmission facilities designed and used to transmit lesser amounts of power over shorter distances?
2. interstate utilities for their alleged "use" of federal high-voltage transmission facilities, but at the same time exempt from such taxation intrastate rural electric cooperatives that admittedly "use" such federal facilities?
3. those it has determined to be users of federal electric power transmission facilities, but at the same time exempt users of facilities owned by the State of Montana from such beneficial-use taxes?
4. five interstate utilities for their alleged "use" of the Montana Intertie, notwithstanding (1) that the utilities do not own, possess, or control the Montana Intertie; (2) that BPA transmits power for the utilities over the Montana Intertie pursuant to express congressional direction; and (3) that Congress authorized, and the taxing authorities have collected, federal "impact aid" payments consequent to the construction and operation of the Montana Intertie?

PARTIES BELOW AND RULE 28.1 LISTING OF AFFILIATES

Plaintiffs below were Pacific Power & Light Company,[1] Portland General Electric Company,[2] Puget Sound Power & Light Company,[3] The Washington Water Power Company,[4] and the Montana Power Company.[5] Defendants below, in addition to the Montana Department of Revenue, were: Jefferson County; Susan Miller, Treasurer of Jefferson County; Broadwater County; Irene Kemmer, Treasurer of Broadwater County; Powell County; Dalice M. Cook, Treasurer of Powell County; Granite County; Harriet L. Ryan, Treasurer of Granite County; Missoula County; Fern Hart, Treasurer of Missoula County; Mineral County; Billye Ann Bricker, Treasurer of Mineral County; Sanders County; June M. Thayer, Treasurer of Sanders County; and Ed Argenbright, Superintendent of Public Instruction. All of the defendants were represented by counsel for the Montana Department of Revenue.

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[1]Pacific Power & Light Company is an assumed business name for a portion of the electric utility operations of PacifiCorp, an Oregon corporation. The remainder of PacifiCorp's electric utility operations are carried out under the assumed business name of Utah Power & Light Company. Pacific is affiliated with the following direct or indirect subisidiaries that are not wholly owned by PacifiCorp: Eye Dentify, Inc.; Equitec Financial Group, Inc.; Flight Dynamics, Inc.; Arnov Systems, Inc.; NERCO, Inc.; Kamcom Mines, Ltd; Rycon Mines, Ltd.; Ryan Mines, Ltd.; Vol Mines, Ltd.; Black Lake Pipe Line Company; Security Offshore Insurance, Ltd.; Pacific Telecom, Inc.; International Satellite, Inc.; Pacific Satellite, Inc.; FTC Communications, Inc.; Pacific Telecom Cable; PetroCom; Catalina Marketing; Microrim, Telecom Plus International; and Marathon Financial Associates, Inc.

[2]Portland General Electric Company, an Oregon corporation, is a wholly owned subsidiary of Portland General Corporation, an Oregon corporation. Other wholly owned subsidiaries of Portland General Corporation are Miracle Mine Operations, Inc. and Portland General Holdings, Inc. All of the following enterprises are affiliated with Portland General Electric Company as direct or indirect subsidiaries of Portland General Holdings, Inc.: Portland General Energy Systems, Inc.; Portland General Exchange, Inc.; World Trade Center Northwest Corporation; Portland General Financial Services, Inc.; Columbia-Willamette Development Company; Columbia-Willamette Investment Company; Portland General Leasing, Inc.; Columbia-Willamette Leasing, Inc.; Cornerstone Columbia Development Company; FFP, Inc.; and Frontier First Partners; Rail Leasing, Inc.

[3]Puget Sound Power & Light Company, a Washington corporation, is affiliated with only one direct or indirect subsidiary that is not wholly owned — North American Energy Services Company, a Washington corporation.

[4]The Washington Water Power Company, a Washington corporation, has only direct subsidiaries that are wholly owned. The only indirect subsidiary corporation that is not 100 percent-owned is the Limestone Company, Inc.

[5]The Montana Power Company, a Montana corporation, is affiliated with a number of direct subsidiaries, but all are wholly owned. The only indirect subsidiary corporation that is not 100 percent-owned is Intermountain Digital Network, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES BELOW AND RULE 28.1 LISTING OF AFFILIATES ii

TABLE OF CONTENTS iv

TABLE OF CASES AND AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

A. THE FACTS 2

B. THE PROCEEDINGS IN STATE DISTRICT COURT 3

C. THE MONTANA SUPREME COURT DECISION 3

REASONS FOR GRANTING THE WRIT 4

A. THE COMMERCE CLAUSE: MONTANA'S TAX ON THE MONTANA INTERTIE DISCRIMINATES AGAINST INTERSTATE COMMERCE IN ELECTRICITY 4

B. THE SUPREMACY CLAUSE: MONTANA'S IMPOSITION OF BENEFICIAL-USE TAXES IS PREEMPTED BY THE IMPACT-AID PROVISION OF THE REGIONAL ACT, BY THE ANTI-DISCRIMINATION ACT, AND BY THE DOCTRINE OF IMPLIED PREEMPTION 10

1. EXPRESS OR STATUTORY PREEMPTION: BOTH THE IMPACT-AID PROVISION OF THE REGIONAL ACT AND THE ANTI-DISCRIMINATION ACT INVALIDATE MONTANA'S IMPOSITION OF BENEFICIAL-USE TAXES 10

a. THE IMPACT-AID PROVISION OF THE REGIONAL ACT 10

b. THE ANTI-DISCRIMINATION ACT 12

2. THE DOCTRINE OF IMPLIED PREEMPTION INVALIDATES MONTANA'S BENEFICIAL-USE TAXES 14

C. THE FOURTEENTH AMENDMENT: MONTANA'S IMPOSITION OF BENEFICIAL-USE TAXES ON FEDERAL HIGH-VOLTAGE TRANSMISSION FACILITIES VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES 16

D. CONCLUSION 18

TABLE OF CASES AND AUTHORITIES

Page

Cases

Arizona Pub. Serv. Co. v. Snead, 441 U.S. 141 (1979) 13
Baltimore Shipbuilding and Dry Dock Co. v. Baltimore, 195 U.S. 375 (1904) 15
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) . 9
Complete Auto Transit v. Brady, 430 U.S. 274 (1977) 4
Detroit v. Murray Corp., 355 U.S. 489 (1958) 15
M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 14
Mayo v. United States, 319 U.S. 441 (1943) 11
New Energy Co. of Indiana v. Limbach, *108 S. Ct. 1803 (1988)* 4
Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n, 390 U.S. 317 (1968) 17
Pacific Power & Light Company v. Montana Department of Revenue, ___ Mont. ___, 773 P.2d 1176 (1989) 1
Portland General Electric Company v. Montana Department of Revenue, ___ Mont. ___, 773 P.2d 1189 (1989) 1
Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907) : 17
State v. Burbank, 100 Nev. 598, 691 P.2d 845 (1984) 13
Tradesmens National Bank v. Oklahoma Tax Comm'n, 309 U.S. 560 (1940) 5
United States v. Allegheny County, Pa., 322 U.S. 174 (1944) . 15
United States v. County of Fresno, 429 U.S. 452 (1977) 15
United States v. Detroit, 355 U.S. 466 (1958) 15
United States v. Hawkins County, Tenn., 859 F.2d 20 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1638 (1989) 16
United States v. Jackson County, Mo., 696 F. Supp. 479 (W.D. Mo. 1988) 16
United States v. Manassas, Virginia, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 108 S. Ct. 1568 (1988) 8
United States v. Muskegon, 355 U.S. 484 (1958) 15
Washington v. United States, 460 U.S. 536 (1983) 5

Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940) 17

Constitutional Provisions

Article I, section 8, clause 3 of the United States Constitution ("Commerce Clause") 3

Article VI, clause 2 of the United States Constitution ("Supremacy Clause") 3

Fourteenth Amendment to the United States Constitution 3,4,16,17

Statutes and Rules

15 U.S.C. § 391 (1982) 10,12,13

Bonneville Project Act, 16 U.S.C. § 832 (1982) 2

Pacific Northwest Federal Transmission System Act, 16 U.S.C. § 838 (1982) 2

Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839 (1982) 2,3,10

28 U.S.C. § 1257 (1982), as amended by Pub. L. No., 100-352, § 3, 102 Stat. 662 (1988) 1

28 U.S.C. § 2101(c) (1982) 1

48 *Fed. Reg.* 55763 (Dec. 15, 1983) 11,12

Mont. Code Ann. § 15-6-135 (1987) 7,8

Mont. Code Ann. § 15-6-201(a) 6

Mont. Code Ann. § 15-6-141 (1987) 6,8

Mont. Code Ann. § 15-24-1203 (1987) 5,6,9,17

Ch. 478, Montana Laws 1981 6,11

Ch. 683, Montana Laws 1983 5

Ch. 591, Montana Laws 1987 8

United States Supreme Court Rule 20.2 1

United States Supreme Court Rule 28.1 1

Legislative Materials

126 *Cong. Rec.* 10,685 (daily ed. Nov. 17, 1980) 11

Minutes of Montana House Taxation Committee (Jan. 21, 1981) 7,11

Minutes of Montana House Taxation Committee (Mar. 1, 1983) 5

Minutes of Montana Senate Taxation Committee (Mar. 25, 1983) 5,7

Pacific Power & Light Company, Portland General Electric Company, Puget Sound Power & Light Company, The Washington Water Power Company, and the Montana Power Company petition this Court for a writ of certiorari to the Montana Supreme Court to review the opinion in *Pacific Power & Light Company v. Montana Department of Revenue*, ___ Mont. ___, 773 P.2d 1176 (1989).

OPINIONS BELOW

The order of the District Court for Lewis and Clark County, Montana, is unreported and is reprinted in the Appendix. The opinion of the Montana Supreme Court is reported at ___ Mont. ___, 773 P.2d 1176 (1989), and is also reprinted in the Appendix. A timely petition for rehearing was filed, which petition was denied on June 1, 1989. A related challenge to beneficial-use taxes involving only Portland General Electric Company and different federal 500-kV transmission facilities was also upheld by an order of the District Court for Lewis and Clark County, Montana. That unreported decision is reprinted in the Appendix. The trial court's order in the latter case was also affirmed by the Montana Supreme Court, *Portland General Electric Company v. Montana Department of Revenue*, ___ Mont. ___, 773 P.2d 1189 (1989) *("Portland General")*, and is reprinted in the appendix. A timely petition for certiorari in *Portland General* was filed with this Court on August 7, 1989.

JURISDICTION

The Opinion of the Montana Supreme Court was issued on April 17, 1989. Because the petition for rehearing was denied on June 1, 1989, under United States Supreme Court Rule 20.2 and 28 U.S.C. § 2101(c) (1982), a petition for certiorari is due on August 30, 1989. Jurisdiction rests on 28 U.S.C. § 1257 (1982), as amended by Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988).

STATEMENT OF THE CASE

A. The Facts.

The basic facts are not in dispute. The Bonneville Power Administration ("BPA") is a federal power marketing agency empowered by Congress to construct, own, operate, and maintain a major federal electric transmission grid called the Federal Columbia River Transmission System to serve several important federal purposes.[6] Those purposes specifically include the integration and transmission of "electric power from existing or additional Federal or non-Federal generating units . . ." located both within and without the Pacific Northwest.[7] Pursuant to this congressional authority, in the early 1980s BPA constructed, and today BPA operates, maintains, and controls, the Montana Intertie, which is a federal 500-kV transmission line from a point near Townsend, Montana, to BPA's Garrison substation in Broadwater County, Montana.

The Montana Intertie was constructed in part to integrate the power from Colstrip Units 3 and 4, two coal-fired steam electric generating plants located in the coal-rich region of southeastern Montana. Pursuant to congressional authorization, petitioners contracted for BPA to transmit the power from transmission facilities connecting the new Colstrip plants over the Montana Intertie to their service areas to the west, predominantly in Washington and Oregon. The contractual arrangements for such transmission services are in two parts. BPA's transmission services over the Montana Intertie are governed by the Montana Intertie Agreement, Plaintiffs' Ex. 14. BPA transmission services west of the Garrison substation over BPA's "main grid" – undifferentiated BPA transmission facilities of 230 kV and higher – are pursuant to separate contracts with each of the five petitioners. None of the five petitioners has any right to own, operate, maintain, possess, use, or even have physical access to the transmission facilities for which petitioners have been taxed by the State of Montana.

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[6] *See* Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839 (1982) ("Regional Act"); Bonneville Project Act, 16 U.S.C. § 832 (1982); Pacific Northwest Federal Transmission System Act, 16 U.S.C. § 838 (1982).

[7] 16 U.S.C. § 838b (1982).

BPA has paid and will pay Montana for governmental services provided. Pursuant to Section 7(m) of the Regional Act, 16 U.S.C. § 839e(m) (1982), BPA has made "impact-aid" payments to the taxing districts along the corridor of the Montana Intertie. These payments, which by time of trial totalled $156,055, Tr. 522 (Eskridge), were intended to compensate and in fact have compensated those taxing districts for all identifiable economic impacts associated with the construction and continued operation of the Montana Intertie. Notwithstanding these federal payments, the Montana Department of Revenue and the defendant counties have imposed "beneficial-use" taxes upon the five petitioners herein on account of BPA's Montana Intertie.

B. The Proceedings in State District Court.

The Montana Department of Revenue ("Department of Revenue" or "Department") notified petitioners that it was taxing them for their alleged use of the Montana Intertie. Petitioners challenged that action by filing a lawsuit in the Montana District Court for Lewis and Clark County in Helena. The complaint raised three fundamental federal constitutional issues – that the Department's imposition of beneficial-use taxes violated the Supremacy Clause,[8] the Commerce Clause,[9] and the fourteenth amendment. In a non-jury trial, seven witnesses testified in person, and a number of depositions were entered into the record. In addition, numerous documents, transcripts, and exhibits were admitted. On December 21, 1987, the District Court issued an order upholding the taxes. *See* Appendix.

C. The Montana Supreme Court Decision.

Petitioners timely appealed to the Montana Supreme Court which affirmed. *See* Appendix. A petition for rehearing was timely filed, which was denied on June 1, 1989.

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[8]Article VI, clause 2 of the United States Constitution.

[9]Article I, section 8, clause 3 of the United States Constitution.

REASONS FOR GRANTING THE WRIT

The record below establishes that Montana's imposition of beneficial-use property taxes upon petitioners violates the Commerce Clause, the Supremacy Clause, and the fourteenth amendment. Unless the writ is granted, these significant issues of federal constitutional law will not receive the fair and impartial consideration necessary to establish the constitutional violations asserted.

A. The Commerce Clause: Montana's Tax on the Montana Intertie Discriminates Against Interstate Commerce in Electricity.

State legislation that imposes disproportionate burdens on interstate commerce is routinely stricken down even in the absence of federal legislation. *See New Energy Co. of Indiana v. Limbach*, 108 S. Ct. 1803 (1988) (negative aspect of Commerce Clause prohibits economic protectionism). The criteria for evaluating whether a state tax will be invalidated on Commerce Clause grounds are set forth in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) *("Brady")*. In order to withstand a Commerce Clause challenge, the state tax must meet each of *Brady*'s four separate elements or tests. Specifically, the tax must be (1) imposed upon an activity that has a "substantial nexus" with the taxing state,[10] (2) be apportioned fairly among states,[11] (3) not discriminate against interstate commerce, and (4) bear a fair relation to the services provided by the state. *Id.* at 279.

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[10]The nexus requirement is problematic, for the property subject to the tax — the Montana Intertie — is neither operated, possessed, controlled, or used by petitioners. Indeed, four of the five petitioners herein conduct no business operations whatsoever within the defendant taxing districts; their sole contact with the defendant counties is that their power is transmitted by BPA over the Montana Intertie pursuant to a contract between petitioners and BPA. And BPA simply cannot provide *Brady*'s required nexus between BPA's property and the Montana Intertie, for BPA's impact-aid payments to the defendant counties eliminate any justification for basing the assessments on BPA's presence in the counties.

[11]Because "fair apportionment" most often arises in goods-in-transit situations, it is not analyzed here.

According to *Brady*, discrimination against interstate commerce is an independent Commerce Clause test.[12] The record establishes that the challenged beneficial-use taxes on the Montana Intertie were intentionally designed to impose, and have in fact imposed, disproportionate economic burdens upon citizens of states outside of Montana.

The Montana statutory tax scheme was purposefully designed to impose disproportionate economic burdens on interstate commerce. The beneficial-use tax is restricted to federal transmission facilities of 500 kV and above – the interstate freeways for electric power.[13] The 1983 amendment to Mont. Code Ann. § 15-24-1203 provides:

> The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax.

Ch. 683, Montana Laws 1983. This restriction has the effect of imposing Montana's tax burden on those who wish to transmit large amounts of power over long distances. The effect of the tax is to export enormous amounts of taxes to citizens of other states, a result which the sponsors of the 1983 amendment specifically recognized.[14]

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[12]When a claim of discrimination is raised, the judiciary must conduct a thorough, searching inquiry into "the whole tax structure of the state." *Washington v. United States*, 460 U.S. 536, 542 (1983) (quoting *Tradesmens National Bank v. Oklahoma Tax Comm'n*, 309 U.S. 560, 568 (1940)). For obvious reasons the Montana Supreme Court had no inclination to conduct a searching investigation into Montana's tax structure. As a result, this Court is the only independent tribunal available to petitioners where the required searching inquiry can occur. For this reason alone the requested writ should issue.

[13]It is impossible to specify which generating unit's power is going over a specific line to serve a particular customer or customers. Tr. 41-46 (Porter). Moreover, transmission lines are bidirectional, *i.e.*, they can be used to transmit power in either direction. Tr. 64 (Porter). Thus, the Montana Intertie may carry power from east to west one day, and from west to east on the next.

[14]The primary sponsor of the 1983 amendment, Representative Marks, stated that, "If the privilege tax [on BPA 500-kV transmission facilities] is applied, a large amount of the tax would be picked up by consumers outside of the State of Montana." Minutes of Montana House Taxation Committee at 4 (Mar. 1, 1983). In the Senate, Senator Towe noted the obvious – that the vast majority of the taxes (by his calculation, about 85 percent) would be exported to other states. Minutes of Montana Senate Taxation Committee at 2 (Mar. 25, 1983).

The record contains abundant support for the conclusion that 500-kV transmission facilities are the arteries of interstate commerce in power. Mr. Dennis Porter, BPA's transmission engineering expert, testified that high-voltage transmission lines – those of 230 kV and over – are employed to transmit power over long distances, while lower voltage lines generally are used for shorter-distance transmission and local distribution purposes. Mr. Porter also testified that the highest capacity alternating-current lines in service in the western United States are 500 kV; those lines are capable of transmitting approximately 4.7 times the power 230-kV lines can transmit. Tr. 57 (Porter). Thus the text of the statute itself requires that the tax on federal transmission facilities be imposed in a manner that discriminates against interstate commerce.

Other elements of Montana's property tax structure exhibit both the intention and the result that property taxes be shifted to out-of-state consumers of goods and services. For example, the Montana Legislature has gone to extraordinary lengths to shield Montana rural electric cooperatives ("REAs") from taxes that might be imposed on account of federal transmission facilities. First, before it amended Mont. Code Ann. § 15-24-1203 to target federal transmission facilities of 500 kV and over, the Montana Legislature in 1981 enacted Ch. 478, Montana Laws 1981, in hopes that Congress might authorize state taxation of federal transmission facilities. In order to protect parochial interests, the legislation exempted REAs from any possible imposition of taxes consequent to such congressional action.[15] The same 1981 Montana legislation modified the definition of "class eleven" property contained in Mont. Code Ann. § 15-6-141(a) to encompass federal transmission property used to transmit power from a

[15]Specifically, Mont. Code Ann. § 15-6-201(a) was amended to exempt the property of

> the United States, the state, counties, cities, towns, school districts, except, if congress passes legislation that allows the state to tax property owned by an agency created by congress to transmit or distribute electrical energy, the property constructed, owned, or operated by a public agency created by congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives).

privately owned generating station, but again explicitly exempted REAs from the scope of that amendment.[16] Representative Brand, who sponsored the 1981 amendments, made his discriminatory intent manifest; the official minutes of the Montana House Taxation Committee note that he was "hopeful this bill won't tax the co-op [REA] lines." Montana House Taxation Committee Minutes at 3 (Jan. 21, 1981). Moreover, when the 1983 Montana Legislature decided to restrict the scope of beneficial-use taxes on federal facilities to those of 500 kV and over, a primary justification for this voltage limitation was to protect Montana REAs. As the measure's primary sponsor, Representative Marks, warned, "If you got below 500-kV [lines] . . . you could include smaller lines *and REAs*." Minutes of Montana Senate Taxation Committee at 2 (Mar. 25, 1983) (emphasis added). Finally, the Montana Legislature has required that, in order for property to be taxable to REAs as class four property, such property must be "used *and owned by* cooperative rural electrical . . . . associations organized under the laws of Montana. . . ." Mont. Code Ann. § 15-6-135 (1) (a) (emphasis added). Of course, petitioners have been taxed notwithstanding that they do not own the Montana Intertie. Each of these legislative machinations establishes a clear intent to export taxes on federal transmission lines unjustifiably to other states.

The Montana tax classification scheme demonstrates an intent to discriminate against interstate commerce in electricity. Montana "classifies" property into various categories, and applies different tax rates to each category. For electric utilities, there are basically two types or classes of property: Property owned or "used" by investor-owned utilites such as petitioners, and property owned by Montana REAs. While the operations of Montana REAs are restricted to intrastate activities — the distribution of power to rural areas and communities in the state — the

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[16]The definition, with the 1981 amendment in italics, is as follows:

> (a) centrally assessed electric power companies' allocations, *including, if congress passes legislation that allows the state to tax property owned by an agency created by congress to transmit or distribute electrical energy, allocations of properties constructed, owned, or operated by a public agency created by the congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives).*

operations of petitioners are predominantly interstate in character.[17] Montana REA property is taxed at a rate one-fourth the rate imposed upon petitioners' property, *viz.*, three percent of true cash value as opposed to twelve percent of true cash value. Mont. Code Ann. §§ 15-6-135, 15-6-141 (1987). Thus, Montana REA customers pay only one-fourth the property taxes petitioners' interstate electric customers would pay upon an *identical* piece of property.

Another example of legislative intent to discriminate against interstate commerce occurred in 1987, when the Montana Legislature last amended the beneficial-use statute.[18] That amendment exempts persons or entities who use state-owned railroad tracks and rights-of-way so long as such persons or entities use the property exclusively for railroad purposes. Because the Montana Legislature has provided no similar exemption for users of federally owned property, the beneficial-use statute runs afoul of this Court's recent decision affirming *United States v. Manassas, Virginia*, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 108 S. Ct. 1568 (1988). Because the beneficial-use tax statute treats those who contract with the federal government worse than those who contract with the state, Montana's imposition of taxes on the alleged "users" of the Montana Intertie should be struck down.

In summary, the Montana statutory scheme is infected with numerous provisions that reflect a clear intent to discriminate against both interstate commerce and those with whom the federal government deals. The Montana Legislature very recently reinforced this intent by exempting state-owned railroad property from taxation, even though such taxpayers (unlike petitioners) may have exclusive use, possession, and control of the tax-exempt property. For each of these four reasons, the Montana statutory scheme regarding implementation of beneficial-use taxes is unconstitutional on its face.

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[17]Portland General Electric Company, Puget Sound Power & Light Company, and The Washington Water Power Company derive virtually no revenues from Montana retail consumers of electric power, and Pacific Power & Light Company serves only a handful of customers in northwest Montana.

[18]Ch. 591, Montana Laws 1987.

Montana's beneficial-use tax laws also have been administered in a fashion that discriminates against interstate commerce. First, although the Department has admitted in writing that Montana REAs do in fact "use" federal high-voltage transmission facilities in Montana, Department Brief to Montana Supreme Court at 33-34 (Nov. 10, 1988), it has studiously avoided even investigating whether REAs should pay benefical-use taxes. Tr. 918-19 (Whittinghill). Nothing in the text of Mont. Code Ann. § 15-24-1203 (1987), limits the scope of the statute for 500-kV transmission-line taxes to investor-owned utilities; nonetheless, the Department has targeted *only* such utilities — to the exclusion of Montana REAs.

The Department's failure even to investigate REA "use" of federal transmission facilities is all the more egregious, for it is manifest that the REAs derive benefits from high-voltage transmission facilities in the state. For example, Mr. Porter of BPA stated that power delivered to Montana REA preference customers is scheduled across the entire BPA system, which of course includes the 500-kV facilities in northwest Montana located between the Idaho border and BPA's Hot Springs substation. Tr. 190-91. And BPA's Montana representative, George Eskridge, testified that power from the federal Columbia River power system would come over a variety of paths, including the Idaho border-Hot Springs 500-kV system. Tr. 491.

Not only does Montana's beneficial-use tax discriminate against interstate commerce, its imposition bears no fair relation to the services provided by the state, as is required by *Brady*. There is no such relationship in the present case because any services provided by the taxing districts are provided not to petitioners but, rather, to BPA. Moreover, under the "impact aid" provision of the Regional Act, the taxing authorities have *already* been compensated for *all* past substantial impacts occasioned by the construction and continued existence of the Montana Intertie,[19] and will be compensated for any future identifiable impacts. These two circumstances completely override any applicability that *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), might otherwise have.

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[19]Indeed, BPA's George Eskridge testified that BPA had already paid the three defendant counties in which the Montana Intertie is located over $150,000 in impact-aid payments. Tr. 522.

In sum, the Montana statutory scheme, as well as the Department's implementation of that scheme, violate the criteria established in *Brady*.

B. The Supremacy Clause: Montana's Imposition of Beneficial-Use Taxes Is Preempted by the Impact-Aid Provision of the Regional Act, by the Anti-Discrimination Act, and by the Doctrine of Implied Preemption.

Petitioners' challenge involves two types of Supremacy Clause claims, one based upon implied preemption and the other upon statutory preemption. Montana's imposition of beneficial-use taxes is statutorily preempted because it is in conflict with two federal statutes, the impact-aid provision of the Regional Act[20] and the Anti-Discrimination Act.[21]

1. Express or Statutory Preemption: Both the Impact-Aid Provision of the Regional Act and the Anti-Discrimination Act Invalidate Montana's Imposition of Beneficial-Use Taxes.

a. The Impact Aid Provision of the Regional Act.

In Section 7(m) of the Regional Act, 16 U.S.C. § 839e(m) (1982), Congress authorized BPA to make "impact aid" payments to local governmental units affected by the construction and continued operation of new high-voltage federal transmission facilities. The obvious logic behind the impact-aid provision was to eliminate any possible basis for a claim that the Montana Intertie and similar facilities would not be "paying their way." Pursuant to the impact-aid provision, the three defendant counties in which the Montana Intertie is located applied for, received, and presumably have spent the $156,055 in payments from BPA on account of the Montana Intertie. Tr. 522 (Eskridge). Federal and Montana State legislative history indicates that the impact-aid provision was enacted as a specific response to Montana's assertion that local taxing districts along the Montana Intertie deserved compensation.

The federal legislative history establishes that the impact-aid provision was written into the Regional Act at the last minute. It appears that initially some thought had been given to a

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[20] 16 U.S.C. § 839e(m) (1982).

[21] 15 U.S.C. § 391 (1982).

provision that would have been a payment in lieu of taxes, *see* 126 *Cong. Rec.* 10,685 (daily ed. Nov. 17, 1980) (remarks of Rep. Dingell), which approach normally requires ongoing congressional funding. That approach, however, was rejected in favor of a BPA-funded, more targeted plan that would compensate the local taxing districts for all economic impacts occasioned by providing governmental services in response to the construction and operation of new high-voltage federal transmission facilities. *Id.* Congress was particularly careful to note that any such payments not be an obligation of the United States; instead, BPA was authorized to use its own funds derived from its power operations to satisfy the taxing districts. *See* 48 *Fed. Reg.* 55763 (Dec. 15, 1983).

Montana legislative materials provide additional information regarding the development of the impact-aid provision. After enactment of the Regional Act in 1980, Montana's Congressman Williams apparently reported back to the Montana Legislature regarding his efforts to seek federal authorization for a tax upon new federal transmission facilities such as the Montana Intertie. *See* Minutes of Montana House Taxation Committee at 3 (Jan. 21, 1981). Representative Williams noted that he had sought, but had not been able to secure, passage of a provision that would have required payment of full property taxes upon such facilities. *Id.* His recommendation to the 1981 Montana Legislature was that it enact legislation that would permit imposition of state property taxes upon federal facilities in the event Congress in the future could be persuaded to authorize such state taxation of federal facilities. *Id.* The legislative materials state, "Rep. Williams pointed out that this bill [Ch. 478, Montana Laws 1981] would be unenforceable unless Congress backed it up." *Id.* at 4.[22]

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[22]Congressman Williams' position – that Congress must authorize taxation of federal facilities – was well founded. In *Mayo v. United States*, 319 U.S. 441 (1943), the Court upheld an injunction against a state's enforcement of a statute imposing fees upon a commodity owned by the United States. The Court stated,

> But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom [from taxation] continues.

Id. at 448.

Finally, after passage of the Regional Act, BPA set about implementing its authority and, on December 15, 1983, published a notice of opportunity for public comment. In that notice, BPA asserted that

> The intent [of the impact-aid policy] is to pay for a qualifying local government's cost of services concerning a BPA major transmission facility located within the government's boundaries. . . . Services covered are all those reasonably related to the facility and the personnel associated with it, and include fire protection, police protection, facility planning services, emergency services, road maintenance, school services, etc. . . .

48 *Fed. Reg.* 55764 (Dec. 15, 1983). Shortly after the final revised impact-aid policy was adopted, the defendant counties in which the Montana Intertie is located requested and received $156,055 in impact-aid payments. Tr. 522 (Eskridge).

Property taxes are frequently justified on the grounds that they are the price of living in an ordered society. In this instance, however, Congress has provided a specific vehicle whereby the defendant counties have been fully reimbursed for all economic impacts consequent to the construction and operation of the Montana Intertie. Obviously, had Congress (including Montana's Congressman Williams) contemplated that the state could impose beneficial-use taxes upon petitioners on account of the Montana Intertie, the impact-aid provision would not have been enacted. Enactment of Section 7 (m) of the Regional Act signals a clear congressional understanding that Montana may *not* impose taxes on the Intertie and, accordingly, Montana's imposition of beneficial-use taxes on account of those transmission facilities is preempted.

b. Anti-Discrimination Act.

A second federal statute, Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (1982) ("Anti-Discrimination Act"), preempts Montana's imposition of beneficial-use taxes. The Anti-Discrimination Act provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates

> against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

15 U.S.C. § 391.

While general discrimination against interstate commerce is the focus of the Commerce Clause portion of this petition, *supra*, it is important here to note that any discrimination against interstate commerce in electricity, however indirect, is prohibited by the Anti-Discrimination Act. Congress obviously believed that protecting interstate generation and transmission of electricity from the burdens of discriminatory state taxes was of such a high priority that something more than the generic protections of the Commerce Clause itself was needed. Accordingly, the Anti-Discrimination Act was promulgated. The conclusion is similarly inescapable that Congress intended that the Anti-Discrimination Act afford the interstate generation and transmission of electricity greater protection against discriminatory state taxes than the Commerce Clause alone. Thus, scrutiny under the Anti-Discrimination Act must be even more stringent than under *Brady*.

Arizona Pub. Serv. Co. v. Snead, 441 U.S. 141 (1979), illustrates the broad scope of the protection under the Anti-Discrimination Act. There, the unanimous Court invalidated a New Mexico tax upon the privilege of generating electricity within the state because out-of-state electricity users bore a greater burden than in-state users. The Court held, "Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute." *Id.* at 150 (emphasis in original; footnote omitted).[23] By the same token, because the tax on 500-kV facilities *itself* necessarily discriminates against electricity sold outside of Montana, the tax violates the federal statute.

---

[23]The Nevada Supreme Court also relied upon the Anti-Discrimination Act in declaring invalid a Nevada tax upon power generated at Hoover Dam. *State v. Burbank*, 100 Nev. 598, 691 P.2d 845 (1984).

2. The Doctrine of Implied Preemption Invalidates Montana's Beneficial-Use Taxes.

The federal government provides a vast array of services to the public. As but one example, the United States has invested virtually billions of dollars in facilities used for the generation and transmission of electric power consumed by private citizens. The vast hydroelectric developments on the nation's waterways, as well as the Tennessee Valley Authority's gigantic thermal generating units, generate enormous amounts of power that are ultimately consumed by industrial, commercial, and residential consumers. If Montana's tax on the BPA's Montana Intertie is allowed to stand, nothing would prevent a state from taxing a private person for his alleged use of federal power generating facilities, federal postal facilities used to deliver the mail, or other federal property. Montana's imposition of beneficial-use taxes is utterly unprecedented.

The Supremacy Clause prohibits Montana's taxation of the Montana Intertie. In *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall anticipated the harm that would flow from Montana's experiment:

> If the States may tax one instrument, employed by the govenment in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.
>
> . . . The question is, in truth, a question of supremacy; and *if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.*

17 U.S. at 432-33 (emphasis added). Thus developed the bright-line distinction: Instrumentalities possessed by the federal government are not subject to state taxation.

Under *M'Culloch*, states may tax federal property if it is possessed by private taxpayers. *Baltimore Shipbuilding and Dry Dock Co. v. Baltimore*, 195 U.S. 375 (1904). But taxation in the absence of possession has never been allowed. *United States v. Allegheny County, Pa.*, 322 U.S. 174 (1944) *("Allegheny")* (federal possessions not subject to state tax). In 1958, this Court developed the *Allegheny* rationale. In *United States v. Detroit*, 355 U.S. 466 (1958), this Court upheld a tax upon a lessee of federal property who had both possession and physical use of the federal property. *Id.* at 470. And in *United States v. Muskegon*, 355 U.S. 484 (1958), a state tax upon a permittee who was in actual possession of a manufacturing plant owned by the United States was upheld. *Detroit v. Murray Corp.*, 355 U.S. 489 (1958), further developed the requirement of a possessory interest under the *M'Culloch* line of cases:

> We see no essential difference so far as constitutional tax immunity is concerned between taxing a person *for using property he possesses* and taxing him *for possessing property he uses* when in both instances he uses the property for his own private ends. Nor have we been pointed to anything else which would bar a State from taxing possession in such circumstances. *Lawful possession of property is a valuable right when the possessor can use it for his own personal benefit.*

Id. at 493 (citation omitted; emphasis added).

United States v. County of Fresno, 429 U.S. 452 (1977) *("Fresno")*, is the most recent significant decision in the *M'Culloch* line of cases. That dispute arose after a California county had imposed an annual tax on private taxpayers' possessory leasehold interests in government-supplied housing. This Court based its opinion on *McCulloch's* first principles, *viz.*, that federal functions and interest not be discriminated against. To determine the validity of the tax, this Court looked to three factors: (1) its legal incidence, (2) whether it was applied in a discriminatory manner, and (3) whether it was based on the total value of the federal interest or only the value of the taxpayers' possessory interest in the property. Here, all three tests are met:

The incidence is in part on BPA because of the "exchange" provision of the Regional Act, Tr. 443-44 (Hammerquist), the discriminatory manner of the tax has already been demonstrated, and the petitioners had no possessory interest whatsoever in the Montana Intertie. Thus *Fresno* by itself invalidates the challenged tax.

Lower federal courts have interpreted the *M'Culloch* line of cases to preclude taxation of federal property in analogous situations. Most recently, the Sixth Circuit affirmed a federal district court's determination that a state could not impose property taxes on a contractor who operates and maintains federal munitions facilities. *United States v. Hawkins County, Tenn.*, 859 F.2d 20 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1638 (1989). And only last year, in *United States v. Jackson County, Mo.*, 696 F. Supp. 479 (W.D. Mo. 1988), the federal district court held that Bendix, which had agreed with the United States government to manage, operate, and maintain a federal munitions facility, could not be taxed for similar alleged use of those facilities. In reaching this holding, the court discussed this Court's 1958 beneficial-use cases, as well as *Fresno*, and concluded that because Bendix lacked exclusive possession of the facilities the tax could not validly be imposed under Missouri law.

C. The Fourteenth Amendment: Montana's Imposition of Beneficial-Use Taxes on Federal High-Voltage Transmission Facilities Violates the Due Process and Equal Protection Clauses.

Both the Due Process Clause and the Equal Protection Clause of the fourteenth amendment apply to this controversy. This fourteenth amendment challenge in some aspects parallels the Commerce Clause challenge and, thus, the facts in the record alluded to in the Commerce Clause portion of this petition are equally applicable here.

Under the Due Process Clause, there is an insufficient nexus between petitioners and the Montana Intertie to allow imposition of the challenged taxes. As this Court stated, the question is

> whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940). *See also Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968) (invalidation of taxes that were not related closely to the value of the property interest being taxed). Of particular significance here is the fact that petitioners have absolutely no right of access to any portion of the property being taxed. In sum, there is simply not sufficient nexus between petitioners and BPA's Montana Intertie to justify the Department's imposition of taxes.

The Equal Protection challenge is based upon the Department's refusal even to consider treating taxpayers similarly situated equally. Unequal administration of tax laws has long been a basis for invoking the Equal Protection Clause. *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907). The Department's utter failure even to investigate whether Mont. Code Ann. § 15-24-1203 should be imposed upon Montana REAs' use of transmission facilities employed by BPA to deliver power to the cooperatives is perhaps the most flagrant example possible of both discriminatory intentions and consequences.

Finally, the Department of Revenue has inflicted an unequal burden. In the long history of the Department's administration of Mont. Code Ann. § 15-24-1203 the Department has always required physical possession of the otherwise tax-exempt facilities coupled with exclusive use of the property in order to trigger tax liability. Tr. 766-88 (Groepper). In the instant situation, the Department has required *neither*. Accordingly, the Department's conduct violates the Equal Protection Clause of the fourteenth amendment.

D. Conclusion

For the reasons stated above, a writ of certiorari should issue to the Montana Supreme Court.

Respectfully submitted,

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89-364

No. _____

Supreme Court, U.S.
FILED
AUG 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC POWER & LIGHT COMPANY, et al.,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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APPENDIX

TABLE OF CONTENTS

	Page
Constitutional and Statutory Provisions	1a
Portland General Electric Co. v. Department of Revenue of the State of Montana, (Lewis and Clark County Dist. Ct. 1988) (unreported)	13a
Portland General Electric Co. v. Montana Department of Revenue, ___ Mont. ___, 773 P. 2d 1189 (1989)	55a
Pacific Power & Light Co. v. Department of Revenue of the State of Montana, (Lewis and Clark County Dist. Ct. 1988) (unreported)	35a
Pacific Power & Light Co. v. Montana Department of Revenue, ___ Mont. ___, 773 P. 2d 1176 (1989)	63a

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution, article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Commerce Clause of the United States Constitution, article I, section 8, clause 3, provides:

> [The Congress shall have power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Section 2121(a) of the Tax Reform Act of 1978, 15 U.S.C. § 391 (1982) ("Anti-Discrimination Act"), provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For the purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The fourteenth amendment to the United States Constitution, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4 of the Pacific Northwest Federal Transmission System Act, 16 U.S.C. § 838b (1982), provides:

> The Secretary of Energy, acting by and through the Administrator [of the Bonneville Power Administration] shall operate and maintain the Federal transmission system within the Pacific Northwest and shall construct improvements, betterments, and additions to and replacements of such system within the Pacific Northwest as he determines are appropriate and required to:
>
> (a) integrate and transmit the electric power from existing or additional Federal or non-Federal generating units;
>
> (b) provide service to the Administrator's customers;
>
> (c) provide interregional transmission facilities, or
>
> (d) maintain the electrical stability and electrical reliability of the Federal system; *provided, however,* That the Administrator shall not construct any transmission facilities outside the Pacific Northwest, excepting customer service facilities within any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a distribution cooperative which has (i) no generating facilities, and (ii) a distribution system from which it serves both within and without said region, nor shall he commence construction of any major transmission facility within the Pacific Northwest, unless the expenditure of the funds for the initiation of such construction is specifically approved by Act of Congress.

Section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839e(m) (1982), provides:

> (1) Beginning the first fiscal year after the plan and program required by section 839b(d) and (h) of this title are finally adopted, the Administrator may, subject to the provisions of this section, make annual impact aid payments to the appropriate local governments within the region with respect to major transmission facilities of the Administrator, as defined in section 3(c) of the Federal Columbia River Transmission Act —
>
> (A) which are located within the jurisdictional boundaries of such governments,
>
> (B) which are determined by the Administrator to have a substantial impact on such governments, and
>
> (C) where the construction of such facilities, or any modification thereof, is completed after December 5, 1980, and, in the case of a modification of an existing facility, such modification substantially increases the capacity of such existing transmission facility.
>
> (2) Payments made under this subsection for any fiscal year shall be determined by the Administrator pursuant to a regionwide, uniform formula to be established by rule in accordance with the procedures set forth in subsection (i) of this section. Such rule shall become effective upon its approval, after considering its effect on rates established pursuant to this section, by the Federal Energy Regulatory Commission. In developing such formula, the Administrator shall identify, and take into account, the local governmental services provided to the Administrator concerning such facilities and the associated costs to such governments as the result of such facilities.

(3) Payments made pursuant to this subsection shall be made solely from the fund established by section 11 of the Federal Columbia River Transmission System Act. The provisions of section 13 of such Act, and any appropriations provided to the Administrator under any law, shall not be available for such payments. The authorization of payments under this subsection shall not be construed as an obligation of the United States.

(4) No payment may be made under this subsection with respect to any land or interests in land owned by the United States within the region and administered by any Federal agency (other than the Administrator), without regard to how the United States obtained ownership thereof, including lands or interests therein acquired or withdrawn by a Federal agency for purposes of such agency and subsequently made available to the Administrator for such facilities.

Section 1341 of Title 28, U.S.C. (1982), provides:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Montana's "beneficial-use" tax statute, Mont. Code Ann. § 15-24-1203 (1987), provides (the penultimate sentence was added by the 1983 Legislature, and the last sentence was added by the 1987 Legislature):

> After March 17, 1969, there is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax may be imposed upon the possession or other beneficial use of buildings owned by public entities and located upon public airports. However, privately owned buildings located on such airport property are subject to tax. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber or grazing leases or permits issued by the United States or the State of Montana or upon any easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or track acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state retains ownership and the right-of-way and track is [*sic*] used exclusively for rail transportation.

Montana's definition of Class Eleven property, Mont. Code Ann. § 15-6-141 (1987) provides:

(1) Class eleven property includes:

(a) centrally assessed electric power companies' allocations, including, if congress passes legislation that allows the state to tax property owned by an agency created by congress to transmit or distribute electrical energy, allocations of properties constructed, owned, or operated by a public agency created by the congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives);

(b) allocations for centrally assessed natural gas companies having a major distribution system in this state; and

(c) centrally assessed companies' allocations except:

(i) electric power and natural gas companies' property

(ii) property owned by cooperative rural electric and cooperative rural telephone associations and classified in class five;

(iii) property owned by organizations providing telephone communications to rural areas and classified in class seven;

(iv) railroad transportation property included in class fifteen; and

(v) airline transportation property included in class seventeen.

(2) Class eleven property is taxed at 12% of market value.

Montana's definition of Class Five property, Mont. Code Ann. § 15-6-135 (1987), provides:

(1) Class five property includes:

(a) all property used and owned by cooperative rural electrical and cooperative rural telephone associations organized under the laws of Montana, except property owned by cooperative organizations described in subsection (1)(b) of 15-6-137;

(b) air and water pollution control equipment as defined in this section;

(c) new industrial property as defined in this section;

(d) any personal or real property used primarily in the production of gasohol during construction and for the first 3 years of its operation;

(e) all land and improvements and all personal property owned by a research and development firm, provided that the property is actively devoted to research and development;

(f) machinery and equipment used in electrolytic reduction facilities.

(2)(a) "Air and water pollution equipment" means facilities, machinery, or equipment used to reduce or control water or atmospheric pollution or contamination by removing, reducing, altering, disposing, or storing pollutants, contaminants, wastes, or heat. The department of health and environmental sciences shall determine if such utilization is being made.

(b) The department of health and environmental sciences' determination as to air and water pollution equipment may be appealed to the board of health and environmental sciences and may not be appealed to either a county tax appeal board or the state tax appeal board. However, the appraised value of the equipment as determined by the department of revenue may be appealed to the county tax appeal board and the state tax appeal board.

(3) "New industrial property" means any new industrial plant, including land, buildings, machinery, and fixtures, used by new industries during the first 3 years of their operation. The property

may not have been assessed within the state of Montana prior to July 1, 1961.

(4)(a) "New industry" means any person, corporation, firm, partnership, association, or other group that establishes a new plant in Montana for the operation of a new industrial endeavor, as distinguished from a mere expansion, reorganization, or merger of an existing industry.

(b) New industry includes only those industries that:

(i) manufacture, mill, mine, produce, process, or fabricate materials;

(ii) do similar work, employing capital and labor, in which materials unserviceable in their natural state are extracted, processed, or made fit for use or are substantially altered or treated so as to create commercial products or materials; or

(iii) engage in the mechanical or chemical transformation of materials or substances into new products in the manner defined as manufacturing in the 1972 Standard Industrial Classification Manual prepared by the United States office of management and budget.

(5) New industrial property does not include:

(a) property used by retail or wholesale merchants, commercial services of any time, agriculture, trades, or professions;

(b) a plant that will create adverse impact on existing state, county, or municipal services; or

(c) property used or employed in any industrial plant that has been in operation in this state for 3 years or longer.

(6) Class five property is taxed at 3% of its market value.

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PACIFIC POWER & LIGHT COMPANY,
an Assumed Business Name of PacifiCorp,
a Maine Corporation;
PORTLAND GENERAL ELECTRIC COMPANY,
an Oregon Corporation;
THE WASHINGTON WATER POWER COMPANY,
a Washington Corporation;
PUGET SOUND POWER & LIGHT COMPANY,
a Washington Corporation;
THE MONTANA POWER COMPANY,
a Montana Corporation,
Plaintiffs,

-vs-

DEPARTMENT OF REVENUE OF THE
STATE OF MONTANA; JEFFERSON COUNTY;
SUSAN MILLER, Treasurer of Jefferson County;
BROADWATER COUNTY; IRENE KEMMER,
Treasurer of Broadwater County;
POWELL COUNTY; DALICE M. COOK,
Treasurer of Powell County
GRANITE COUNTY; HARRIET L. RYAN,
Treasurer of Granite County;
MISSOULA COUNTY; FERN HART,
Treasurer of Missoula County;
MINERAL COUNTY; BILLYE ANN BRICKER,
Treasurer of Mineral County;
SANDERS COUNTY; JUNE M. THAYER,
Treasurer of Sanders County; and
ED ARGENBRIGHT,
Montana State Superintendent of Public Instruction,
Defendants.

Cause No. 50978

ORDER

This is a proceeding for declaratory and injunctive relief brought under Section 15-1-406, MCA, and Title 27, Chapter 8, MCA to determine the validity of a beneficial use tax assessed against Plaintiffs for the year 1984 with regard to the 500 kV transmission line between Townsend, Montana and Garrison, Montana.

OVERVIEW

A. PARTIES

Plaintiffs are 1) Pacific Power & Light Company (Pacific), an assumed business name for the electric utility operations of PacificCorp, a Maine corporation which provides retail electric utility service to customers located in Oregon, Washington, Wyoming, California, Idaho and Montana; 2) Puget Sound Power and Light Company (Puget), a Washington corporation which provides retail electric utility service to customers located in the western Washington area; 3)Portland General Electric Company (PGE), an Oregon corporation which provides retail electric utility service to customers located in Oregon; 4) Washington Water Power Company (Washington Water), a Washington corporation which provides retail electric utility service to customers located predominantly in Washington and Idaho; and 5) the Montana Power Company (MPC), a Montana corporation which provides retail electric service to customers located in Montana. MPC and Puget own an undivided interest in Colstrip Units 1 and 2. Each Plaintiff owns an undivided interest in Colstrip Unit 3, and four of the five Plaintiffs own an undivided interest in Colstrip Unit 4. Collectively, Plaintiffs are referred to as the "Colstrip Owners."

Defendants are the Montana Department of Revenue (DOR), an administrative agency of the State of Montana charged with administering the tax laws of the State of Montana; the counties of Jefferson, Broadwater, Powell, Granite, Missoula, Mineral, and Sanders, political subdivisions of the State of Montana; the treasurers of the above counties, Susan Miller, Irene Kemmer, Dalice M. Cook, Harriet L. Ryan, Fern Hart, Billye Ann Bricker, and June Thayer; and Ed Argenbright, the State Superintendent of Public Instruction.

B. HISTORY

1. Colstrip 1 and 2

Colstrip, Montana became the site for two coal-fired electricity-generating stations in the mid-1970's when MPC and Puget constructed Colstrip Units 1 and 2. Colstrip Unit 1 was placed in commercial service on September 24, 1975 and Colstrip Unit 2 on May 22, 1976. Each unit is rated at 330 megawatts. MPC has operated and maintained these units and continues to do so.

A 230 kV line from the Billings area to Colstrip was built to help supply the necessary power to build the Colstrip facilities. Two 230 kV lines were constructed from the Colstrip facilities to a point near Broadview in order to move future energy out of Colstrip. (Tr. p. 202) The 230 kV lines were adequate for transmission of energy from Colstrip 1 and 2 to points west. (Tr. pp. 230-231, 233) MPC performed a wheeling service for Puget in order to get Puget's power to points west. (Tr. p. 231)

2. Colstrip 3 and 4

The Colstrip Owners subsequently constructed Colstrip Units 3 and 4. Each of these units is rated at 770 megawatts. Thus, approximately 2,200 megawatts of electric energy is generated at Colstrip Units 1, 2, 3, and 4. (Tr. p. 99) Colstrip Unit 3 was declared to be in commercial service in January of 1984 and Colstrip Unit 4 was so declared in April of 1986. (Pre-Trial p. 4)

Mr. Brush, an MPC employee, testified that, prior to constructing Colstrip Units 3 and 4, the Colstrip Owners knew there was insufficient transmission capacity to transmit power from those units to points west. (Tr. p. 231) The preexisting 230 kV lines were insufficient for transmission of power from Colstrip Units 1, 2, and 3. (Tr. p. 103) The additional megawatts from Units 3 and 4 necessitated a direct 500 kV path for purposes of transmission to Garrison. (Tr. p. 103) Plaintiffs concede that with the added generation from Units 3 and 4, increased transmission capability was needed. (Plaintiffs' Proposed Finding of Fact No. 7) Therefore, the Colstrip Owners converted the two 230 kV circuits to a single 500 kV transmission line, providing a direct path from Colstrip to Broadview. (Tr. p. 102) (The western United States has a maximum AC voltage of 500 kV. The choice for

long distance transmission, i.e., over 100 miles, would be the highest voltage line which, in the case of BPA's system, would be 500 kV. Long distance lines would generally be limited by stability. A stability limited 500 kV transmission line has the capacity to transmit approximately 4.7 times as much power as a stability limited 230 kV transmission line. (Tr. pp. 53, 56, 57) The Colstrip Owners also constructed a substation at Broadview. (Tr. pp. 232 and 102) Then they built a double circuit 500 kV transmission line from Broadview to a point near Townsend to accommodate the output of Colstrip Units 3 and 4 and Puget's share of 1 and 2. The capacity of both these segments of transmission line is about 2,000 megawatts. (Tr. pp. 234 and 105) It cost the Colstrip Owners $220,000,000 to build the Colstrip-Townsend lines. (Tr. pp. 235 and 236)

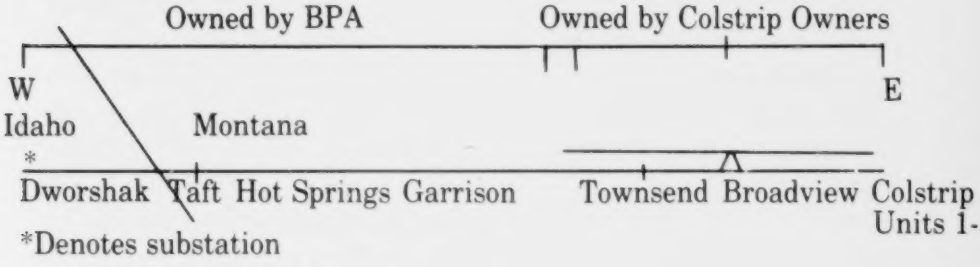
On behalf of the Colstrip Owners, MPC requested the Bonneville Power Administration (BPA) to interconnect the federal transmission system with the Colstrip Owners' project somewhere in the vicinity of Helena and Ovando. (Tr. p. 238) (Exhibit 4 4) The Colstrip Owners requested BPA's help because they were unable to obtain a right-of-way across an Indian reservation, and BPA had such a right-of-way that was thought to be sufficient to handle a 500 kV line. (Tr. p. 238) The Colstrip Owners wished to connect to the federal system because most of their load centers were located within BPA's service area. (Tr. p. 239) (See p. 2 of this Opinion. Only MPC and Pacific have customers in Montana.) BPA built 500 kV transmission lines commencing at Townsend. (Pre-trial p. 3)

The Townsend-Garrison segment was designed to specifically interact and be an integral part of the Colstrip-Garrison transmission project. (Tr. p. 104) Mr. Brush testified that if BPA had not constructed the line, someone, probably the Colstrip Owners, would have constructed it. (Tr. p. 240) Without the Townsend-Garrison segment, Colstrip Units 3 and 4 could not be effectively used. (Id.) There are no other adequate transmission paths by which Colstrip power from Units 1 through 4 could be transmitted to Garrison. (Tr. p. 104) It was necessary to have the complete Colstrip-Garrison transmission line system if power was to be transmitted from Colstrip to Garrison. (Tr. pp. 104 and 105) If 2,000 megawatts of energy were not available at Colstrip, the Broadview-Garrison segment would not have been constructed at the time it was. (Tr. pp.

374-375)

Although not at issue in this case, Colstrip generation also precipitated the construction of the Garrison-Taft line. (Id.)

The 500 kV transmission lines from Colstrip to the west are illustrated as follows:



*Denotes substation

There are no 500 kV transmission lines from Colstrip east. There are no other 500 kV lines in Montana.

3. BPA

a) General

Mr. Porter testified as follows:

> "The Bonneville Power Administration is a power marketing agency of the federal government. It is responsible for marketing the power that is generated by federal hydroelectric sites and other resources that are acquired by Bonneville in the Pacific Northwest. It essentially markets that power by selling it to the various customers in the northwest, preference customers and others."

(Tr. p. 32)

BPA is the dominant transmission system of the Pacific Northwest. (Tr. p. 303) It owns about ¾ of the total transmission grid in the northwest. (Tr. p. 36) The Federal Columbia River Transmission System is the system of transmission lines, substations, and related facilities owned by BPA plus those facilities over which BPA has obtained rights of usage through lease or other agreement. (Tr. pp. 35, 36, 330) Townsend, Montana is considered the eastern most part of

the Federal Columbia River Transmission System. (Tr. p. 330)

b) BPA Customers

i) Preference Customers

The Bonneville Project Act that established BPA provided that power generated by federal facilities should go first to public agencies including municipalities, co-ops, public utility districts and some federal agencies. (Tr. p. 35) These customers are preference customers. (Id.) Rural electric co-ops are one element of the preference customer class and, in Montana, include Lincoln Electric Cooperative, Flathead Electric Cooperative, Missoula Electric Cooperative, Ravalli County Electric Cooperative, Vigilante Electric Cooperative, and Glacier Electric Cooperative. (Tr. p. 492) Most of BPA's preference customers in Montana are served through wheeling arrangements with an intermediate utility. (Tr. pp. 150-151) For example, MPC transmission lines are used to deliver federal power to Ravalli County Electric Cooperative. (Tr. p. 151) BPA makes enough energy available to MPC to cover the loads of BPA's customers. It was not necessary to build the Townsend-Garrison line to serve Montana preference customers. (Tr. p. 373) BPA did not construct the Townsend-Garrison line to serve BPA's preference customers (Tr. p. 264) Construction of the Colstrip Units did not enhance BPA's service to its preference customers although any time a major addition is made to the system, the system's reliability increases. (Tr. p. 566) The Townsend-Garrison transmission line is not designated as a transmission facility used to serve preference customers. (Tr. p. 151) The Townsend-Garrison line is not contractually used to serve BPA preference customers. BPA's preference customers are not billed for any use of the Townsend-Garrison line. (Tr. pp. 151-152, 581) There was no reason to believe that a 500 kV line from Townsend-Garrison was needed to provide adequate wheeling to BPA for preference customers. (Tr. pp. 264 and 372)

ii) Direct Service Industry Customers

Direct Service Industry (DSI) customers are those who receive power directly from BPA for their own end use. (Tr. p. 485) They have access to the federal system but they do not have preference rights. (Tr. pp. 485-486) DSI loads are firm loads to which BPA is committed. (Tr. p. 570) The Columbia Falls aluminum plant is BPA's only Montana DSI. It has a power demand of 345 megawatts. (Tr. pp. 485-488)

c) Generation

Federal power is power from the federal generation system. There are two such facilities in Montana — the Libby project at about 500 megawatts and Hungry Horse at about 300 megawatts. (Tr. pp. 483 and 495) First call of that power goes to preference customers. However, with regard to Hungry Horse, the first preference is preference customers in western Montana. The second preference is preference customers in all of the State of Montana. The remaining power is available to the northwest. (Tr. p. 484) Generation from Libby and Hungry Horse is greater than the federal loads in western Montana. (Tr. at pp. 563 and 495)

d) Impact Aid Payments

Impact aid was available to Montana counties affected by the construction of the Townsend-Garrison 500 kV transmission line. Such aid was congressionally approved by virtue of the enactment of Section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980. However, BPA's impact aid policy was not promulgated until March 18, 1985 and was not approved by the Federal Energy Regulatory Commission until 1986.

BPA prepared its impact aid policy to provide for three types of impact aid: preconstruction, construction, and post-construction. Preconstruction impact aid was directly billable by the counties for services they provided primarily with regard to the location of the line. (Tr. pp. 503-504) No preconstruction aid was requested or paid. Mr. Eskridge testified that the Act had not been passed at the time applicable for preconstruction aid. (Tr. p. 506) Construction impact aid was designed by BPA to reimburse affected counties for the presence of a non-local work force during the construction period.

Mr. Eskridge testified:

> "[I]mpact aid again in our mind is only for the cost of the services provided to our people .... [I]t is reasonable to assume that our people, our construction people would utilize the library .... They utilize the police protection .... or police services, fire services, whatever. Those services they do utilize during the time they are there, so the philosophy of impact aid is that the counties should be compensated for providing that service."

(Tr. p. 515)

The following construction period impact aid payments were made to affected Montana counties for the Townsend-Garrison property:

Powell County (1982, 1983, 1984, and 1985)	$ 61,410.00
Broadwater County (1982 and 1983)	29,570.00
Jefferson County (1982 and 1983)	64,895.00
Missoula County (1983, 1984, and 1985)	51,466.00
Granite County (1983, 1984, 1985)	98,100.00
Mineral County (1984 and 1985)	155,606.00

Post-construction period impact aid is available as a direct charge by affected Montana counties for any actual services which they might render to BPA. As Mr. Eskridge explained:

> "Say somebody tore out the fence, and we asked the county to have their local sheriff's office investigate that and try to find the person responsible. Well then they could bill us for that activity on our behalf and we would pay it. Another example would be a fire. Say we had a fire in one of our facilities and the local rural fire department responded to that fire. Well then they could bill Bonneville for that service and we would in turn pay for that."

(Tr. p. 525)

Mr. Eskridge noted that such occurrences were not very common. (Id.) BPA has not paid or been requested to pay any post-construction period impact aid to any affected Montana county.

4. Montana Intertie Agreement (See Plaintiffs' Exhibit 7)

a) General

The transmission lines from Broadview to Garrison are known as the Montana Intertie. (Tr. p. 72) Under the Transmission Agreement between the United States acting by and through BPA and the Montana Intertie Users (the Colstrip Owners – MPC, Pacific, Puget, PGE, and Washington Water), BPA agreed to construct, operate, and maintain the 500 kV lines from Townsend to Garrison and the Garrison substation. In addition, BPA agreed to provide firm transmission services over the Montana Intertie from Townsend to Garrison for the Colstrip Owners in amounts not to exceed the east-west transmission demands specified for each owner in Exhibit D of the agreement. Such Exhibit provides:

	Townsend-Garrison East to West Transmission Demands
MPC	390,600 kW
Puget	655,500
PGE	260,400
Pacific	130,200
Washington	195,300
Basin*	98,000
	1,730,000 kW

(*Basin Electric subsequently withdrew from the agreement. Its transmission demand was reallocated among the Colstrip Owners according to their percentage of the total east-west demand. (Tr. p. 864) Thus, under the Montana Intertie agreement, Colstrip Owners have a contract path from Townsend to Garrison. (Tr. p. 360) The Colstrip Owners have reserved all but 185 megawatts of east-west transfer capacity across the line for 22 years. (Tr. p. 378) According to Exhibit D, the Townsend-Garrison line would carry all the power output from Colstrip Units 3 and 4 owned by MPC, PGE, Pacific, Washington Water and Puget. All of Puget's share of power from Units 1 and 2 would also be transmitted over the Townsend-Garrison line. Approximately 1,730 megawatts of the Colstrip Owners' power is scheduled over the Townsend-Garrison line. (Exhibit D of Exhibit 7) The Colstrip Owners have contracted for over 90% of the firm transmission capability of the Townsend-

Garrison line.

For their part of the agreement, the Colstrip Owners agreed to construct, operate, and maintain the Broadview-Townsend transmission line and other such facilities needed to transfer power to Broadview. In addition, the Colstrip Owners agreed to provide firm transmission services over the Montana Intertie from Broadview to Townsend to BPA not to exceed the east-west transmission demands specified for BPA in Exhibit D beginning on the date when a 500 kV transmission line, connecting Garrison to the 500 kV portion of the Federal transmission system, first became available for power. (Such a line did not become available until 1986. (Tr. p. 407) Exhibit D provides:

Bonneville 185,000 kW

Neither BPA nor Western Area Power Administration exercised its east-west transmission capability during the years 1983-1985. (Tr. p. 407) Plaintiffs state that BPA is currently using its 185 megawatt reservation to transmit WAPA power from east to west. (Plaintiffs' Findings #28)

Colstrip Owners have contracted for firm transmission services. According to the agreement, firm transmission means BPA is required to accept the full scheduled amounts of scheduled power to the extent that the amounts do not exceed the transmission demands specified in Exhibit D. BPA has also contracted with each Colstrip Owner to deliver power from the Garrison substation over the FCRTS to each of the Plaintiffs' retail service areas. (See Exhibits 8, 12, 13, 14 and 15)

Nonfirm transmission service is service that could be interrupted at the discretion of the wheeling party. (Tr. p. 172) If BPA could find a party that would contract for nonfirm services, such services would benefit BPA. (Tr. p. 176) Mr. Brush had no knowledge of any nonfirm transmissions across the Montana Intertie. (Tr. p. 261) Only after 1986 was there nonfirm use. (Tr. pp. 328 and 329)

There is no west-east firm transmission service. (Tr. p. 324) Plaintiffs state that BPA has reserved all west-east transmission to itself. (Plaintiffs' Finding No. 29) At the time of the 1984 and 1985 assessments, DOR had no knowledge of any users of the Townsend-Garrison line other than the Colstrip Owners.

The term of the agreement is 22 years. However, the Colstrip

Owners have a right to renew the Montana Intertie Agreement in terms not less favorable than those originally agreed to, for a period of time not to exceed the duration of the Colstrip generation projects.

b) Payments for Use of Montana Intertie

After scheduling over the Montana Intertie commenced in October 1983, the Colstrip Owners became legally obligated to pay a monthly Intertie Charge to the BPA pursuant to the terms of the agreement irrespective of whether any Colstrip power was transmitted over the Townsend-Garrison transmission line. (Plaintiffs' Exhibit 7) The Intertie Charge represents payment by the Colstrip Owners for the entire east-west capacity of the Townsend-Garrison transmission line, except for the 185 megawatt reservation in favor of the government. It is computed upon the following formula:

$$\text{Intertie Charge} = \left(\frac{\text{Total Annual Costs}}{\text{12 Months}} - \text{Non-firm Revenues} \right) \times \frac{\text{Capacity Requirement - Exchange Credit}}{\text{Total Capacity Requirement}}$$

Total annual costs of facilities associated with the Townsend-Garrison line is the total of 1) interest and amortization of associated Federal investment and the appropriate allocation of general plant costs, 2) operation and maintenance costs, 3) an allowance for BPA's general administration costs which are appropriately allocable to such facilities, and 4) impact aid payments. Total annual costs will be adjusted to reflect reductions to unpaid total costs as a result of any amounts received, under agreements for firm transmission service over the Montana Intertie, by the govenment on account of any reduction in transmission demand, termination or partial termination of any such agreement or otherwise to compensate BPA for the unamortized investment, annual cost, removal, salvage or other cost related to such facilities. Subtracted from total annual costs is the nonfirm transmission charge times the total nonfirm energy transmitted over the Townsend-Garrison line and the total nonfirm energy transmitted in either direction by the government over the Townsend-Garrison line. A customer's capacity requirement equals its transmission demand as set forth in

Exhibit D. The capacity requirement is reduced by the exchange credit. As compensation for the transmission services provided to BPA by any of the Colstrip Owners, beginning when a 500 kV line connecting Garrison to the 500 kV portion of the Federal transmission system first became available, BPA agreed to provide an exchange credit in the calculation of the Colstrip Owners' Intertie Charge. The computation of the exchange credit is complex. Lastly, the total capacity requirement is 1,915 kV.

C. THE BENEFICIAL USE TAX ASSESSMENT

Section 15-24-1203, MCA, provides as follows:

"After March 17, 1969, there is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax may be imposed upon the possession or other beneficial use of buildings owned by public entities and located upon public airports. However, privately owned buildings located on such airport property are subject to tax. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber, or grazing leases or permits issued by the United States or the state of Montana or upon any easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or track acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state retains ownership and the right-of-way and track is used exclusively for rail transportation.

DOR prepared a beneficial use tax assessment for each of the Colstrip Owners' interest in the Townsend-Garrison 500 kV transmission line for tax year 1984. DOR used the unit valuation method in arriving at its assessment. The unit approach is applied to all centrally assessed property. (Tr. p. 848) Ms. Whittinghill testified that "that method is used because typically these companies are so thoroughly integrated that it would be hard to ascertain a value for the entire company as a whole, if you tried to go and piecemeal appraise each individual object that the company operates." (Tr. p. 848) The unit approach to valuation utilizes three indicators to obtain a value: the cost indicator, the income indicator, and the market or stock and debt indicator. (Tr. p. 848)

Through the cost indicator, DOR tried to get an idea of what the physical cost of the property would be. (Tr. p. 853)

DOR determined that the cost of constructing the Townsend-Garrison line was $92,282,000. It made such determination as follows:

1.	Cost per mile of the Townsend-Garrison 500 kV transmission line (Defendants' Exhibit 1A, page 6 of attachment to Eskridge letter to Whittinghill)	$ 840,900
2.	Number of miles of Townsend-Garrison 500 kV line (Tr. pp. 861-862)	95 miles
3.	Cost of line $840,900 x 95 miles (Tr. p. 861)	$ 79,885,500
4.	Cost of line as per first Exhibit D (Tr. p. 862)	$ 73,262,000
5.	Cost of line as per last revised Exhibit D (Tr. p. 862)	$ 123,698,000
6.	Cost of line relied upon by DOR	$ 92,281,833

($79,885,500 + $73,262,000 + $123,698,000) ÷ 3 (Tr. p. 862)

In order to determine the specific interest of each of the Colstrip Owners in the transmission line, DOR looked to the reserved transmission demands set forth in Exhibit D of the Montana Intertie

Agreement. (See p. 12 of this Opinion) The Department totaled the east-west transmission demands for all of the Colstrip Owners and then divided each owner's reserved transmission demand by the total transmission demand. (Tr. p. 864) The resulting percentage represented the reserved transmission capacity that each Colstrip Owner had in the Townsend-Garrison 500 kV transmission line. DOR then multiplied each Owner's percentage by the $92,282,000 cost of the line to arrive at each Owner's allocated cost of the Townsend-Garrison line, as follows:

Pacific	$92,282,000 x 8%	= $ 7,382,560
Puget	$92,282,000 x 40%	= $36,912,800
PGE	$92,282,000 x 16%	= $14,765,120
Washington Water	$92,282,000 x 12%	= $11,073,840
MPC	$92,282,000 x 24%	= $22,147,680

(See Defendants' Exhibit 1A)

The resulting allocated cost of the Townsend-Garrison line for each Colstrip Owner was then integrated into each owner's individual cost indicator by adding it to the cost of the owner's other operating property. For example, the cost worksheet of Pacific provides the following categories, of which the beneficial use assessment for the Townsend-Garrison line is only one (figures other than the beneficial use assessment have been deleted): (See Defendants' Ex. 1, p. 2)

	ORIGINAL COST	DEP. RESERVE	OCLD
PLANT:			
Colstrip #3			
Wyodak			
CWIP			
Libby Turbine			
Leased Equipment from others - BPA	$7,382,560	$7,382,562 (Tr. p. 868)	
Materials & Supplies			
TOTALS			
ADJUSTMENTS: BPA			
CWIP			

Obsolescence

TOTALS

NON TAXABLE:

Licensed vehicles

TOTAL

The figures to be used for the worksheet would be obtained from the FERC Form 1 which the utilities file each year. (Tr. p. 867)

DOR also used the income indicator for purposes of valuing the operating properties of Pacific for 1984. (Tr. p. 871) Such indicator is used "to relate income and an overall rate to determine value." (Id.) The beneficial use assessment was not treated in the income indicator. Ms. Whittinghill testified that the Colstrip Owners' tax representatives agreed that the beneficial use assessment would be treated only in the cost indicator. (Tr. pp. 872, 1069-1071)

DOR also used the market or stock and debt indicator to value Pacific's properties but without including the beneficial use assessment. DOR then weighted the total cost indicator (of which the beneficial use assessment was part) by 40%, the total income indicator by 50%, and the total market indicator by 10%. (See Defendants' Exhibit 1, p. 3) Then DOR added the three weighted indicators plus the cost of work in progress to reach a total system value of $2,186,654 for Pacific in 1984. Such figure multiplied by the total of the owner's system value subject to assessment in Montana (for Pacific — .05954) resulted in $130,193 to be apportioned to each of the appropriate taxing jurisdictions as per administrative guidelines. Pacific's share of the cost of the Townsend-Garrison line based upon its transmission demand was $7,382,500.

DOR did not assess a beneficial use tax against any user of the Hot Springs to Idaho border portion of the 500 kV transmission line system, because BPA represented that there were no nonfederal users of that transmission line during calendar year 1983 and none of the Colstrip Owners reported any beneficial use interest in the transmission line for calendar year 1983. Other than the 500 kV transmission line extending from Townsend to Garrison, and the portion of the 500 kV transmission line extending from the Hot Springs substation to the Idaho border, there were no other 500 kV

transmission systems in the State of Montana which were otherwise tax exempt during calendar year 1983 and, thus, subject to beneficial use taxation.

DOR did not employ a valuation methodology which was based upon the amount of generation at the Colstrip facilities, the amount of electricity transmitted across the Townsend-Garrison 500 kV transmission line, the act of generating or producing energy at the Colstrip generating plants or the act of transmitting energy from the Colstrip generating plants. The BPA is not obliged, contractually under the terms of the Montana Intertie, to assume any portion of the beneficial use taxes which are levied and assessed against the Colstrip Owners. (Plaintiffs' Ex. 7, Ex. E)

D. HISTORY OF CASE

In mid-1984, DOR notified each Colstrip Owner of DOR's revised 1984 proposed ad valorem valuation of their Montana properties. The valuation included sums attributed to the Colstrip Owners' beneficial use of Townsend-Garrison transmission lines and associated facilities pursuant to Section 15-24-1203, MCA. (Agreed Facts filed September 19, 1986) Plaintiffs paid the tax and filed this cause of action requesting that such tax be refunded with interest.

OPINION

Plaintiffs' Complaint, alleging that the imposition of the beneficial use tax is illegal, sets forth seven counts. Three arise under the United States Constitution — violation of the Supremacy Clause, the Commerce Clause and the Fourteenth Amendment. Three counts involve state constitutional claims and the last claim involves Plaintiffs' beneficial use or lack thereof of the transmission lines.

Each claim is addressed separately below.

1. Supremacy Clause

A state cannot levy a tax directly against the government of the United States or its properties without the consent of Congress. M'Culloch v. Maryland, 4 Wheat 316, 4 L.Ed 579 (1819). However, a tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been commonplace in this country.

Henneford v. Silas Mason Co., 300 U.S. 577, 587, 81 L.Ed 814, 818, 57 S. Ct. 524 (1937). Plaintiffs contend that they do not have possession or control of the 500 kV lines at issue, and therefore the beneficial use tax cannot be assessed against them. In support, Plaintiffs cite three cases: United States v. Detroit, 355 U.S. 467, 2 L.Ed.2d 424, 78 S.Ct. 474 (1958); United States v. Muskegon, 355 U.S. 484, 2 L.Ed.2d 436, 78 S.Ct. 483 (1958); and Detroit v. Murray Corp., 355 U.S. 489, 2 L.Ed.2d 441, 78 S.Ct. 458 (1958). Although there was possession or control of the property at issue in the above cases, none of the decisions, which determined the constitutionality of a beneficial use tax, were based upon possession or control. Furthermore, the Supreme Court in U.S. v. Fresno, 429 U.S. 452, 50 L.Ed.2d 683, 97 S. Ct. 699 (1977) stated as follows:

> "These cases make it clear that a state may, in effect, raise revenues on the basis of property owned by the U.S. as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." (Emphasis supplied)

Plaintiffs' first contention fails.

Secondly, Plaintiffs state that the tax must be set aside if it discriminates against the United States or those with whom it deals. U.S. v. Detroit, 355 U.S. 467, 2 L.Ed.2d 424, 78 S.Ct. 474 (1958). Plaintiffs assert that the beneficial use tax discriminates against them because it inflicts a larger burden on them than they would bear if they had constructed, operated, and maintained the lines themselves. (Trial Brief p. 18) In support, Plaintiffs argue that DOR has imputed to them the full cost of the lines even though they only use 90% of the east-west capability. Plaintiffs agreed, under the Montana Intertie Agreement, to pay the full cost of the lines in exchange for 90% of the east-west capability. (See p. 12 & 13 of this Opinion) Certainly, DOR could not be criticized if it did value the lines at the figure that Plaintiffs, in an arms-length transaction, agreed to pay for 90% of east-west transmission. But DOR did not use such figure. It used only 40% of the amount Colstrip Owners agreed to pay under the Montana Intertie Agreement in order to reach its assessment. (See p. 22 of this Opinion)

Plaintiffs also argue that they are discriminated against because

they were taxed upon the full cost of the line even though the duration of the Montana Intertie Agreement is only 22 years which is 61% of the estimated life of the lines. Again, Plaintiffs agreed to pay full cost for a 22 year contract. Secondly, Plaintiffs were not taxed upon full cost — but only upon 40% of full cost. Lastly, the Montana Intertie Agreement is renewable. (See Plaintiffs' Exhibit 7, p. 5) (See this Opinion at p. 15)

Plaintiffs' argument that they are discriminated against fails.

Thirdly, Plaintiffs argue that the United States Supreme Court in Fresno set forth three factors to determine the validity of a use tax. According to Plaintiffs, those factors are:

a) the legal incidence of the tax;

b) whether the tax is applied in a discriminating manner;

c) whether the tax was based on the total value of the federal interest or only the value of the taxpayer's possessory interest in the property.

Evidently with regard to the second factor, Plaintiffs argue that "because [the tax] is restricted to interstate high voltage 500 kV lines, [it] is structured and implemented so as to have maximum impact upon electric ratepayers residing outside of Montana." (Emphasis in orig.) Plaintiffs are mistaken. The tax is *not* resticted to interstate 500 kV lines. (See Section 12-24-1203, MCA; See p. 17 of this Opinion) It is restricted to lines of a design capacity of 500 kV or more. Other arguments raised by Plaintiffs with regard to the above factors have already been addressed.

Plaintiffs' fourth argument is that the beneficial use tax is statutorily preempted by Section 7(m) of the Regional Act, 16 USC § 839e(m) (1982) and also by § 212(a) of the Tax Reform Act of 1976. After carefully reviewing Section 7(m) of the Regional Act and Mr. Eskridge's testimony, this Court finds that impact aid authorized by that section is not in lieu of taxation. (See Section 7(m) attached to Plaintiffs' Trial Memorandum and Tr. pp. 470-581)

Plaintiffs also assert that the beneficial use tax is preempted by Section 212(a) of the Tax Reform Act. Such section provides for taxation of the generation or transmission of electricity. That is not at issue in this case. Defendants in this case have assessed a tax against Plaintiffs for their beneficial use of a 500 kV line. Plaintiffs argument is, thus, without merit. (See Plaintiffs' Reply Brief, pp. 9-10)

2. Commerce Clause

The parties agree that Complete Auto Transit v. Brady, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977) is applicable to this case. There, the United States Supreme Court stated that past decisions:

> "have sustained a tax against Commerce Clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and, [4] is fairly related to the services provided by the State."

Plaintiffs acknowledge that the location of the BPA transmission lines in Montana constitutes an activity "with a substantial nexus [between BPA and] the taxing State." However, Plaintiffs then argue that there is no nexus because BPA has been directed to make impact aid payments and because Plaintiffs do not own, possess, or operate the Townsend-Garrison lines. Plaintiffs do not elaborate on their argument. It goes almost without saying that Colstrip Owners' contractual right to transmit 1,730 megawatts of power across Montana is a sufficient nexus to the State of Montana.

Plaintiffs concede that the second criterion "is not particularly germane to the present situation" in both their Trial Memorandum and Opening Brief. (Trial Memo p. 36 and Opening Brief p. 54)

With regard to the third criterion, Plaintiffs argue that the beneficial use tax discriminates against interstate commerce in at least two ways. First, Plaintiffs argue that the tax is restricted to transmission facilities that are designed to have the maximum impact upon interstate commerce while exempting therefrom facilities which are designed and constructed to have a lesser impact upon interstate commerce. Plaintiffs are mistaken. The tax applies to the use of 500 kV lines. MPC, who serves mostly Montana consumers, is assessed in the same manner as PGE. The tax impacts intrastate and interstate users of 500 kV lines equally.

Secondly, Plaintiffs argue that the tax is being applied in a discriminating manner in that only the Colstrip Owners have been assessed. Plaintiffs state that Montana electric cooperatives "rely on the existence of the Hot Springs-Dworshak 500 kV line in order to obtain the power they sell to their Montana customers." (Em-

phasis supplied) (Opening Brief p. 56) Plaintiffs also state that "if the Colstrip Owners' arrangement with BPA with regard to the Townsend-Garrison lines constitutes 'beneficial use' so does the cooperatives reliance on BPA." (Opening Brief p. 56) The rural cooperatives may be relying on the BPA to provide power to them but they have no right to the lines. They are merely BPA's customers. By comparison, Colstrip Owners have a contractual right to transmit 1,730 megawatts of power across the Townsend-Garrison lines. The rural cooperatives have no such right.

Plaintiffs also argue that it is discriminating not to tax BPA's other customers for the 500 kV lines. The above discussion with regard to rural cooperatives holds equally true for BPA's other customers.

Lastly, Plaintiffs argue that the taxes bear no relationship to the services provided by the counties to Plaintiffs. However, in Commonwealth Edison v. Montana, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981), the United States Supreme Court held that it would not engage in a cost/benefit analysis when state taxes were challenged based upon the Commerce Clause. It stated:

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government — that it exists primarily to provide for the common good."

Commonwealth Edison at pp. 897-898.

3. Fourteenth Amendment

All Plaintiffs' fourteenth amendment arguments have been addressed above.

cooperatives'
cooperatives

4. Private Interests

Section 5(1)(a) of Article VIII of the Montana Constitution provides:

> "(1) The legislature may exempt from taxation:
> (a) Property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, but any private interest in such property may be taxed separately." (Emphasis supplied)

Based upon a committee comment, Plaintiffs argue that "private interest" is a legal right to physical possession or occupancy — i.e., the taxpayer must have a right to possess or occupy the property before the state may impose a tax upon it. (Trial Memo at p. 46) It is unnecessary to refer to committee comments as the section is clear on its face.

Colstrip Owners have a contractual right to transmit 1,730 megawatts of power across the Townsend-Garrison line. Such right is not a public right. It is Colstrip Owners' private right. Colstrip Owners do have a private interest and thus, may be subject to taxation.

5. Retrospective Laws

Based upon Article XIII, Section I, Clause 3 of the 1972 Montana Constitution, Plaintiffs assert that because they entered into the Montana Intertie Agreement in 1981 and the amendment to Section 15-24-1203, MCA was not enacted until 1983, they cannot be taxed. Plaintiffs have failed to support their contention in any substantial manner. The Court notes that if Plaintiffs were correct, all new forms of taxation would be prohibited.

6. Impairment of Contract

Article II, Section 31 of the 1972 Montana Constitution establishes that the State may not impair the obligation of contract. In their one paragraph addressing this issue, Plaintiffs argue that beneficial use tax impairs the Montana Intertie Agreement. Plaintiffs' argument is rejected pursuant to Bryne v. Fulton Oil Co., 85 Mont. 329, 278 P. 514 (1929) and Forbes v. Mid-Northern Oil Co., 100 Mont. 10, 45 P.2d 673 (1935).

7. Beneficial Use

Section 15-24-1203, MCA, is triggered by possession or beneficial use. Plaintiffs argue that they do not possess or beneficially use the line because they do not have concrete rights in and to the property. Based upon the record, it is clear that the Townsend-Garrison 500 kV line was built specifically to accommodate the interest of the Colstrip Owners. Plaintiffs have a clearly distinguishable use interest in the 500 kV line property from Townsend to Garrison. Plaintiffs' last claim fails.

Plaintiffs have not sustained their burden of proving that the imposition of beneficial use taxes pursuant to Section 15-24-1203, MCA, violates any statutory or constitutional rights. Therefore, this Court finds that such taxes have been lawfully imposed. Such taxes shall be disbursed from the protest accounts in which they are presently being held and shall be distributed as per Section 15-1-402, MCA.

IT IS SO ORDERED

DATED this 21st day of December, 1987.

DISTRICT JUDGE

pc:

No. 88-151

IN THE SUPREME COURT OF THE STATE OF MONTANA
1989

PACIFIC POWER & LIGHT COMPANY,
PUGET SOUND POWER & LIGHT COMPANY,
PORTLAND GENERAL ELECTRIC COMPANY,
WASHINGTON WATER POWER COMPANY,
AND THE MONTANA POWER COMPANY,
Plaintiffs and Appellants,

-vs-

MONTANA DEPARTMENT OF REVENUE,
et al.,
Defendants and Respondents.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis and Clark, The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Donald R. Murray; Murphy, Robinson, et al., Kalispell, MT

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For Respondent:

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Submitted: February 21, 1989
Decided: April 17, 1989

Mr. Justice L. C. Gulbrandson delivered the Opinion of the Court.

Appellants appeal the order of the First Judicial District Court, Lewis and Clark County, in a declaratory judgment action, upholding the validity of the Montana Department of Revenue's (DOR) assessment of beneficial use taxes for the year 1984 against the appellants pursuant to § 15-24-1203, MCA. These beneficial use taxes were assessed for the appellants' firm transmission demands upon certain Bonneville Power Administration (BPA), 500 kilovolt (KV) transmission lines located between Townsend, Montana and Garrison, Montana. We affirm the order of the District Court.

In the mid-1970s, two mine-mouth, coal-fired electric generating plants were built by Montana Power Company (MPC) and Puget Sound Power and Light Company (Puget), at Colstrip, Montana. Each of these plants produce 330 megawatts of electrical power consuming 30 megawatts internally at each plant. These plants have been operated and maintained by the Montana Power Company since being placed in service in 1975 and 1976.

To market the power produced by Colstrip Units I and II, two 230 KV electrical transmission lines were built to transmit the power from Colstrip to a point near Broadview, Montana. Other 230 KV lines moved the energy from Broadview to markets or "loads" located in western Montana and the Pacific Northwest. This system of 230 KV lines proved adequate for transmitting the energy generated from Colstrip Units I and II.

In the late 1970s and early 1980s, MPC and Puget, in conjunction with Portland General Electric Company (PGE), Washington Water Power Company (WWP) and Pacific Power and Light Company (PPL) foresaw an increased demand in the Pacific Northwest for electrical power. Consequently, they decided to build Colstrip Units III and IV. (Colstrip Units III and IV each have a generation capacity of 770 megawatts (MW) of electrical power with each plant consuming approximately 70 MW internally.) These five companies, the appellants in this case, were the owners of undivided interests in Colstrip Units III and IV at the time of the assessment of the beneficial use taxes which are the subject of this litigation. They shall hereinafter be collectively referred to as the Owners.

Realizing that the existing system of 230 KV transmission lines

would be insufficient to transmit the additional 1,400 MW produced by Colstrip Units III and IV in 1977, the Owners entered into negotiations with the BPA to build two 500 KV transmission lines from Townsend to the BPA's existing 500 KV lines at Taft, Montana.

The Owners would convert the existing 230 KV lines stretching from the Colstrip generating point to a substation located at Broadview, Montana, into 500 KV lines. They then would construct new 500 KV lines from Broadview, Montana to the anticipated BPA 500 KV lines beginning in Townsend.

For its part, the BPA executed two primary agreements with the Owners. These agreements stated the BPA would construct and operate those 500 KV lines referred to as the Montana Intertie line, which runs from Townsend, Montana to Garrison, Montana, and the Garrison West line, which runs from Garrison, Montana, to a point designated as the Taft substation on the Montana-Idaho border. These lines would link with the BPA's currently existing 500 KV system at the Taft substation.

In preparation for Colstrip Unit III going on-line in January, 1984, the BPA completed construction of the 500 KV lines from Townsend, Montana to Garrison, Montana, in 1983. There is no substation at the point where the BPA and Owners' lines meet near Townsend. The BPA completed the Garrison West line in 1986. This facilitated the transmission of Colstrip Unit IV power to the Taft substation and points to the west.

In 1983, the Montana Legislature, realizing use of the proposed BPA 500 KV lines extending from Townsend to Taft would be exempt from state property taxes, passed an amendment to § 15-24-1203, MCA, to close the loophole which provided this tax windfall. The amendment provides for the assessment of a beneficial use tax against users of exempt electrical transmission lines having a 500 KV or greater rating. After passage of this amendment, the DOR began meeting with the Owners, their representatives and the BPA to determine a value for the Montana Intertie line which would be placed in service in 1984.

A definite value for the Montana Intertie line had not been established by early 1984. The DOR thus based its assessment on the average of the initial agreement's project value and estimates of the actual cost of constructing these lines. The resulting value for the

Montana Intertie line was established at $92,000,000. The DOR then factored this value into the cost portion of the standard unitary method and assessed taxes to each owner based upon their firm transmission demands under the Montana Intertie Agreement. The Owners protested the imposition of these beneficial use taxes and this lawsuit resulted.

In 1985 and each subsequent year, the DOR has assessed beneficial use taxes against the Owners for their use of the 500 KV lines referred to in this opinion and in each case the Owners have protested and filed lawsuits seeking declaratory injunctive relief from the imposition of those taxes. The individual facts of those cases are not dealt with in this opinion.

The Owners present seven separate issues in this appeal:

1. Whether the Owners' lacked that sufficient "Beneficial Use" of the subject facilities necessary for the imposition of beneficial use taxes under § 15-24-1203, MCA?
2. Whether the challenged taxes violate the Commerce Clause of the United States Constitution?
3. Whether the challenged taxes violate the Supremacy Clause of the United States Constitution?
4. Whether the challenged taxes violate the guarantee of due process and equal protection found in the Fourteenth Amendment?
5. Whether the challenged taxes violate the "Private Interests" clause of the Montana Constitution?
6. Whether the challenged taxes violate the "Retrospective Laws" clause of the Montana Constitution?
7. Whether the challenged taxes violate the "Impairment of Obligation of Contracts" clause of the Montana Constitution?

BENEFICIAL USE

A state's right to impose beneficial use taxes on a private citizen or corporation's possession or use of property owned by the United States is well established. United States v. County of Fresno (1977), 429 U.S. 452, 462, 97 S.Ct. 699, 704, 50 L.Ed.2d 683, 692. However, these taxes must be imposed equally on others similarly situated. Id. at 462, 97 S.Ct. at 705, 50 L.Ed.2d at 692. The policy reason for allowing these taxes is to prevent the unfair trade advantage accruing to those private users of exempt properties over their competitors who must

pay ad valorem taxes on similar, privately held properties. Id. at 463, 97 S.Ct. at 705, 50 L.Ed.2d at 692-693.

The Owners maintain that the beneficial use taxes may not be imposed upon them as they do not have a beneficial interest in or receive a beneficial use from the 500 KV lines. They contend in order to impose beneficial use taxes the state must show that the Owners have possession of the exempt property and that this possession is exclusive, excluding other users of the lines and restricting physical access to the property. As evidence of their lack of possession or exclusive use, the Owners cite to the following facts. The maintenance and actual operation of the Townsend to Garrison 500 KV lines is controlled by the BPA. The BPA has reserved 185 MW of East to West transmission capacity unto itself and the Owners do not have access to the West to East transmission capacity over the Montana Intertie. Further, the testimony of experts at trial and in depositions established that it is impossible to identify the exact path that electrical power will follow when introduced into an integrated system such as exists between Colstrip and Garrison. In other words, one cannot identify whether the Owners' Colstrip power injected into the system at Colstrip flows over the 500 KV transmission lines or over other existing 230 KV transmission lines which interact with the 500 KV lines at the Broadview and Garrison substations.

We find, however, that the Owners do possess a sufficient beneficial use interest in the 500 KV lines, from Townsend to Garrison, which justifies the imposition of beneficial use taxes.

The United States Supreme Court has defined "beneficial use," in a case arising out of Missoula County, Montana, as follows:

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of someone on his behalf.

Montana Catholic Missions v. Missoula County (1906), 200 U.S. 118, 127, 26 S.Ct. 197, 200, 50 L.Ed. 398, 402. See also Harrison v. City of Missoula (1965), 146 Mont. 420, 407 P.2d 703. Further the

U.S. Court of Appeals for the Ninth Circuit has recognized a state may tax those contract rights granting such a beneficial use interest. International Paper Co. v. County of Siskiyou (9th Cir. 1974), 515 F.2d 285. In the International Paper Co. case the counties attempted to tax the companys' interest in standing timber located in national forests. Under the sale contracts, title to the timber remained with the Forest Service until it had been cut, scaled and paid for. The Ninth Circuit held that the timber property, from which the company derived profit, was not exempt from taxation merely because the United States retained legal title to it as security. *Id.* at 289, citing S.R.A., Inc. v. State of Minnesota (1946), 327 U.S. 558, 570, 66 S.Ct. 749, 756, 90 L.Ed. 851, 860.

In the present case, the Colstrip Owners have an enforceable contract interest which gives them the right to the beneficial use of firm (a guaranteed level of the available transmission capacity) megawatts of power transmitted over the Montana Intertie line. The Montana Intertie Agreement gave the Owners the right to inject electrical power into and remove electrical power from the lines up to specific maximum megawatts of power. This right is subject only to the BPA's ability to transmit these amounts onward from the Garrison substation. We note the project scheduled power, (the amount of electric power each company schedules on an hour over the Montana Intertie up to the maximum allowed for each Company's East-West transmission demand) remained under the ownership of the Owners.

The Owners have exercised this right and used these lines to transmit power for their own commercial profit-making activities. Further, absent the transmission of any BPA or non-firm energy, the Owners are responsible for the total annual cost of the lines. The total annual cost of the transmission lines includes the cost of the government's investment in the Montana Intertie line and the Garrison substation, the annual cost of operating and maintaining the transmission line system, the BPA's administrative costs attributable to the lines and the cost to BPA of any impact-aid payments. The payment formula provides that the Owners receive a credit for BPA and non-firm transmission over the lines. The Owners are liable for these payments whether they use the lines or not. Under such an arrangement, we find the Owners clearly have a beneficial use interest in the Montana Intertie 500 KV lines.

The Owners contend, however, that even if a beneficial use existed, the interest was not exclusive, and thus it could not be taxed. The Owners assert they have no reservation of the remaining 185 MW of East to West transmission capacity nor to any of the West to East transmission capacity of the lines. Therefore, the imposition of beneficial use taxes resulted in the Owners being taxed on the full value of the property when they only had use of part of the lines. United States v. County of Allegheny (1944), 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209.

This argument is without merit as the Montana Intertie Agreement provided that the BPA could not exercise its East to West reservation until the Garrison West 500 KV lines were operational. Thus, the BPA had no right to exercise its reservation in 1984, the year in which the taxes in this case were imposed. Secondly, testimony at trial established that the BPA would only allow reservation of a firm transmission demand on the West to East capacity of the lines if a requesting party showed a demonstrated need for use of the lines. Until such a demonstrated need was shown, the only firm transmission users of the lines were the Owners, for whom the lines were constructed, and the BPA.

Testimony at trial established that the Montana Intertie line consisted of two bi-directional 500 KV electrical transmission lines. These bi-directional lines are capable of transmitting electrical power in either direction, however, they are not capable of transmitting power in both directions simultaneously. These lines are stability limited at approximately 2,000 MW, although a BPA employee testified that actual loading of the system at capacity would be lower. In negotiating the Montana Intertie, the Owners and BPA provided for maximum firm transmission demands, East to West, of 1,915 MW. Further, the Owners' intention has been to operate the Colstrip generating units as base loaded units. Base loaded generating units are intended to run at full capacity supplying constant power levels to the system.

We find the Montana Intertie 500 KV lines were built to transmit base load power from East to West. No other parties could use the lines because of the Owners' reservation of more than the amount which could be transmitted beyond the Garrison substation. Until other parties are able to exercise reservations in the lines' transmis-

sion capacity in either direction, at which time the Owners will be credited, the Montana Intertie's total capacity was reserved exclusively to the Owners. Consequently, the State had the statutory right to tax the Owners based upon the full value of the facilities.

COMMERCE CLAUSE

Having found the Owners possessed a taxable beneficial use interest in the exempt facility, we now address the Owners' claims that the imposition of these taxes violated certain sections of the United States and Montana Constitutions. The Owners' first claim is that the imposition of beneficial use taxes on their use of the Montana Intertie line violated the Commerce Clause of the United States Constitution. The Owners contend that the Legislature intended to discriminate against interstate commerce by giving preferential treatment to Montana REA cooperatives and that the DOR has implemented the benefial use statute in a discriminatory manner.

It is well established that a state may raise revenues by taxing a private person or corporation's use of federal property within its jurisdiction, provided the state is taxing the possession or use of the property. United States v. County of Fresno (1977), 429 U.S. 452, 462, 97 S.Ct. 699, 704, 50 L.Ed.2d 683, 692. However, the fact that such a tax may have an impact on interstate commerce will subject the tax to commerce clause scrutiny. Commonwealth Edison Co. v. Montana (1981), 453 U.S. 609, 616, 101 S.Ct. 2946, 2952-2953, 69 L.Ed.2d 884, 893. A state may exact its fair share of the cost of state government from interstate commerce activities within the state, so long as the tax meets the test promulgated in Complete Auto Transit, Inc. v. Brady (1977), 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326. Commonwealth Edison, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894. The Complete Auto Transit test requires, upon examination of the practical effect of the tax, that the tax be applied to an activity having a substantial nexus with the taxing state, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the taxing state. Complete Auto Transit, 430 U.S. at 279, 97 S.Ct. at 1079, 51 L.Ed.2d at 331.

Applying this test to the facts in this case the Owners' activities, subject to the tax, had a substantial nexus to the State of Montana. They had exclusive contract rights to use approximately 90 miles of

BPA 500 KV transmission lines across Montana. These lines were constructed for the purpose of transmitting the Owners' electrical power generated at Colstrip, Montana to Garrison, Montana, and from there to the Owners' service loads. Further, as the Montana Intertie line is entirely within the state there is no potential for multiple state taxation of the use of the facilities. No other state would have jurisdiction to impose beneficial use taxes on these facilities. See, Commonwealth Edison, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894.

Similar to the appellants in Commonwealth Edison, the Owners contend the tax assessed had a discriminatory effect on interstate commerce as the majority of the electrical power transmitted over these lines was destined for out-of-state consumers. These beneficial use taxes thus effectively exported the state's tax burden. However, as in Commonwealth Edison, the tax was computed at the same rate regardless of the destination of the power transmitted. MPC and Pacific used the power to service Montana customers and were assessed and taxed in the same manner as the other users of the lines. The fact the Legislature realized the brunt of the tax would fall upon out-of-state users of these lines would not invalidate the tax.

As stated by the United States Supreme Court:

> [M]otives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. (Citations omitted.) Least of all will they be permitted to accomplish that result when equity and not preference is the end to be achieved.

Henneford v. Silas Mason Co. (1937), 300 U.S. 577, 586, 57 S.Ct. 524, 528, 81 L.Ed. 814, 820.

The Owners also contend this amendment effectively discriminates against bulk transferors of power by benefiting local users of the federal transmission system and those utilities and cooperatives which use lower capacity transmission lines. In support of this contention the Owners point to the fact the amendment to the statute, § 15-24-1203, MCA, only applies to users of 500 KV and larger electrical transmission lines. However, state legislatures have a wide range of choice when they classify or limit items subject to taxation. Henneford, 300 U.S. at 587, 57 S.Ct. at 529, 81 L.Ed. at 821, citing Bell's Gap R. Co. v. Pennsylvania (1890), 134 U.S. 232, 237, 10 S.Ct.

533, 535, 33 L.Ed. 892, 895; Ohio Oil Co. v. Conway (1930), 281 U.S. 146, 159, 50 S.Ct. 310, 313, 74 L.Ed. 775, 781-782.

In the case at hand, the Legislature has identified a class of users of exempt property. This class consists solely of users of 500 KV and larger electrical transmission lines. These lines are used for the bulk transfer of electrical power. In this specific instance the Owners have contracted with the BPA to construct and operate 500 KV lines. As a result of the Owners' contract with the BPA, the Owners have the use of these lines which they otherwise would have been forced to construct themselves. Absent the implementation of the beneficial use tax, the Owners would have received the use of the Montana Intertie transmission facilities, essential to the sale of Colstrip generated power, free of the taxes they would be subject to if they had constructed the lines themselves. We do not find the effect of the legislation was to unfairly tax out-of-state users of the lines, rather the effect is to prevent all users of such exempt lines from unfairly reaping a tax windfall.

The Owners point to cases where the United States Supreme Court and Federal courts have found that state taxes discriminate against interstate commerce in favor of local businesses or consumers. However, these cases are distinguishable. In Boston Stock Exchange v. State Tax Comm'n (1977), 49 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514, the Supreme Court found a transfer tax on out-of-state sales of stocks violated the commerce clause. The Court found that no state "may 'impose a tax which discriminates against interstate commerce .... by providing a direct commercial advantage to local business.'" Boston Stock Exchange, 429 U.S. at 329, 97 S.Ct. at 607, 50 L.Ed.2d at 524, citing Northwestern States Portland Cement Co. v. Minnesota (1959), 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421, 427. In the case at hand, however, the beneficial use tax has been imposed upon both local and interstate users of the 500 KV lines for the purpose of eliminating a tax windfall and competitive advantage which enure to the users of tax exempt federal property. This tax imposes no greater tax liability on interstate users of these lines than on instate users. See Boston Stock Exchange, 429 U.S. at 332, 97 S.Ct. at 608, 50 L.Ed.2d at 526.

Recently in the case of United States v. City of Manassas, Va. (4th Cir. 1987), 830 F.2d 530, the Fourth Circuit Court of Appeals dealt

with a Virginia statute which taxed users of federally owned property, but exempted users of similar state owned property from taxation. There the court found the controlling case for discriminatory state use taxes is Phillips Chemical Co. v. Dumas School Dist. (1960), 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed.2d 384. In Phillips, the Court held such taxes must be examined based on "how other taxpayers similarly situated are treated" requiring "'an examination of the whole tax structure of the state.' Cf. Tradesmens National Bank v. Oklahoma Tax Comm'n, 309 U.S. 560, 568." Phillips, 361 U.S. at 383, 80 S.Ct. at 479, 4 L.Ed.2d at 389. The Phillips Court provided a two-part test for evaluating allegedly discriminatory state use taxes:

> 1) Are the users of federal property treated less favorably than similarly situated users of state property; and
> 2) If so, is that discrimination justified in light of the state and federal interest involved.

City of Manassas, 830 F.2d at 534. The Fourth Circuit Court of Appeals in City of Manassas, interpreted the justification in part two of the test as requiring a determination of whether the user of federal exempt property is similarly situated to a user of state exempt property. City of Manassas, 830 F.2d at 534.

At trial the only references to imposition of beneficial use taxes on state exempt property dealt with two short line railroads and the Great Falls Industrial Park. The Bureau Chief for the Intercounty Property Bureau testified that in 1986 the DOR determined these railroads qualified for imposition of beneficial use taxes under § 15-24-1203, MCA. She testified that those taxes were appealed to the State Tax Appeal Board, but that at the time of the trial, January 19, 1987, the railroads were still subject to beneficial use taxation. The Cascade County Assessor testified that the DOR had assessed beneficial use taxes on users of facilities at the Great Falls Industrial Park where the DOR found private parties' use met the requirements of § 15-24-1203, MCA. Neither party introduced any other beneficial use of similarly situated state exempt property, though several instances of beneficial use of other federal exempt properties were described. Based upon the above testimony we do not find the DOR discriminated against users of federal property in favor of similarly situated users of state exempt property.

Since the trial, the 1987 Legislature amended § 15-24-1203, MCA,

to exempt the beneficial use of railroad right-of-way and track acquired by the state through abandonment, provided the state retains ownership and the right-of-way and track are used exclusively for rail transportation. This amendment was not considered by the District Court in its order of December 21, 1987, and we find it is not properly before this Court on appeal. Hanley v. Dept. of Revenue (1983), 207 Mont. 302, 673 P.2d 1257.

The fourth prong of the Complete Auto Transit test questions whether the tax is fairly related to the services provided by the taxing state. In Commonwealth Edison, the Court found the "operating incidence" of the tax was on the mining of coal in Montana. As the tax was measured as a proportion of the value of the coal taken, it was in proper proportion to the appellant's activities in the state. The present case involves an "operating incidence" similar to Commonwealth Edison which falls upon the Owners' beneficial use of exempt electrical transmission lines found within the state. This tax is measured as a percentage of the value of the property in which the Owners possess their beneficial use interest.

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. (Citations omitted.) When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" (Citations omitted.)

Commonwealth Edison, 453 U.S. at 626-627, 101 S.Ct. at 2958, 69 L.Ed.2d at 900. As the appropriate level of that tax percentage is a legislative matter, we find the tax fairly reflects the taxpayer's activity in the state. Id. at 626-627, 101 S.Ct. at 2958-2959, 69 L.Ed.2d at 901.

SUPREMACY CLAUSE

The Owners' second claim is that the imposition of beneficial use taxes violated the supremacy clause of the United States Constitu-

tion. The Owners correctly assert there are two means by which a state tax may be invalidated under the supremacy clause. The state statute may be preempted by federal action or the tax may improperly place the legal incidence of the tax upon the property of the federal government.

The Owners contend that two federal statutes do in fact preempt Montana's imposition of beneficial use taxes upon private use of federally owned electrical transmission lines. The first is Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (Anti-Discrimination Act) (1982). This statute provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

This statute has been examined in Arizona Public Service Co. v. Snead (1979), 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106. There the Court examined New Mexico's tax on electrical generation and complimentary tax credit for electrical sales in New Mexico. The effect of this credit was to eliminate the 2 percent electrical generation tax for sales to New Mexico's electrical consumers, while taxing sales to out-of-state consumers. 15 U.S.C. § 391 (1982) was passed specifically to outlaw such taxes which place a greater tax burden upon electricity generated or transmitted in interstate commerce. The Court found that because the electrical energy tax indirectly discriminated against electricity sold outside the state, it violated the federal statute. Arizona Public Service Co., 441 U.S. at 150, 99 S.Ct. at 1634, 60 L.Ed.2d at 113. The federal statute does not prevent a state from taxing the generation and transmission of electricity, but only requires that interstate and intrastate generation and transmission be treated equally. *Id.* at 150-151, 99 S.Ct. at 1634, 60 L.Ed.2d at 114.

Initially, we note that no credit is provided under Montana's beneficial use tax to anyone affected by its imposition and none is alleged.

Further, the beneficial use tax on 500 KV electrical transmission lines applies equally to intrastate and interstate users of these lines. Testimony at trial established that Montana Power Company removed all of its power from the system at the Garrison substation for transmission to its load customers. MPC as an intrastate user is taxed at the same rate as the other users of the facilities. Also, this tax falls neither upon the generation nor the transmission of electrical power, but upon the use of tax exempt facilities. As such, this tax does not violate 15 U.S.C. § 391.

The Owners next contend 16 U.S.C. § 839(e)(m) preempts § 15-24-1203, MCA. This statute provides for the payment of impact-aid payments to offset the added cost to affected counties for the three construction phases of the Montana Intertie line. The three construction phases are pre-construction, which was complete before the Act was passed, construction, for which the three affected counties received over $150,000 in impact-aid payments, and post-construction. In the post-construction phase the counties may bill the BPA for any services provided as a result of the presence of the lines. The Owners' contention that these impact-aid payments were in lieu of taxes fails in light of testimony at trial. At trial, BPA's project information officer for the Colstrip transmission project testified that these impact-aid payments were not intended to be in lieu of taxes which the counties were losing as a result of federal ownership of the 500 KV lines. This statement is reinforced by U.S. Representative Dingell's statement contained in the environmental impact statement. 48 Fed. Reg. 55765. ("This is not a payment-in-lieu of taxes provision.")

The Owners also advance an implied preemption argument based upon a line of cases holding that preemption may be inferred when a scheme of federal regulation leaves no room for state regulation, or when the regulation is so dominant as to "preclude enforcement of state laws on the same subject." Hillsborough County v. Automated Medical Laboratories (1985), 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714. The argument fails, however, in light of our previous findings regarding statutory preemption. The impact-aid payments contained in 15 U.S.C. § 839(e)(m), do not preclude a state's right to levy taxes on a private party's beneficial use interest in exempt federal transmission facilities. Further, 15 U.S.C. § 391 only precludes the implemen-

tation of a state tax scheme which places a greater tax burden on generation or transmission of electricity placed in interstate commerce. As previously stated the Montana beneficial use tax is levied on the beneficial use of the facilities and is equally applied to interstate and intrastate users of the facilities.

The Owners' last supremacy clause argument is that the legal incidence of the beneficial use tax falls on the federal government. In order to find a state tax on use of such exempt properties unconstitutional under a legal incidence argument, the taxed entity must be "'so intimately connected with the exercise of a power or the performance of a duty' by the Government that taxation of it would be 'a direct interference with the function of government itself.'" United States v. New Mexico (1982), 455 U.S. 720, 736, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580, 593, citing James v. Dravo Contracting Co. (1937), 302 U.S. 134, 157, 58 S.Ct. 208, 219, 82 L.Ed. 155, 171. "Where the legal incidence of the tax falls on a private party, and they are independent entities from the United States, the tax cannot be considered a tax on the government itself. U.S. v. New Mexico, 455 U.S. at 738, 102 S.Ct. at 1385, 71 L.Ed.2d at 594. In the New Mexico case, the government sought to show that beneficial use taxes, based upon management contracts which transferred payment of any state taxes imposed to the federal government, placed the legal incidence of the tax on the federal government. The United States Supreme Court found that the fact the federal property involved was being used for the government's benefit was irrelevant. *Id.* at 739, 102 S.Ct. at 1385, 71 L.Ed.2d at 595. The Court found the contractors remained "distinct entities pursuing 'private ends,' and their actions remained 'commercial activities carried on for profit.'" *Id.* at 739-740, 102 S.Ct. at 1385, 71 L.Ed.2d at 595, citing United States v. Boyd (1964), 378 U.S. 39, 44, 84 S.Ct. 1518, 1521-1522, 12 L.Ed.2d 713, 718. Such a tax does not fall upon the federal government, but rather upon the contractor's independent commercial enterprise.

In the instant case the tax is levied directly upon the Owners for their beneficial use of the federal government's facilities. There is no transfer of the tax liability to the government. In fact, the Montana Intertie Agreement provides any costs the government incurs by way of the Owners' use of these transmission lines are billable annually to the Owners. The "legal incidence" of the beneficial use tax in this

case clearly falls upon the Owners and not upon the federal government.

The Owners argue that the imposition of these taxes on the Owners' use of the Montana Intertie line would adversely affect the government's ability to secure adequate lease fees from these types of lines. This argument must fail for two reasons. First, the United States Supreme Court has upheld use taxes even where the government by contract agrees to pay the state use or excise tax. See, James v. Dravo Contracting Co. (1937), 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155. Second, in the contracts which grant the use in this case, the Owners are obligated not only to pay the cost of operating and maintaining the lines each year, (less credits for BPA transmissions and non-firm transmissions), but the cost of constructing these lines as well. Under such an arrangement it is implausible that imposing these taxes upon the use of the exempt lines would adversely impact the government's ability to secure adequate lease values.

FOURTEENTH AMENDMENT

The Owners contend the imposition of beneficial use taxes in this case violates the Due Process Clause and the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution. The Owners contend that the Due Process Clause requires that the amount of the tax must bear some relation to the value of the property assessed against the taxpayer. Norfolk & Western Railway Co. v. Missouri State Tax Commission (1968), 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201. The Owners allege that the defendant counties have conferred no benefit upon the Owners because of their use of the Townsend to Garrison facilities, that the defendant counties have already been fully compensated through the impact-aid portions of the Montana Intertie Agreement and that the taxes imposed are based on the full value of the facilities. Further, the Montana Intertie Agreement gives appellants rights which are far less than full ownership.

State tax statutes will not normally be set aside based upon Due Process Clause violations, except in rare and unusual circumstances. A. Magnano Co. v. Hamilton (1934), 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109. Further, to attack the tax statute, the appellants must show a failure to satisfy two tests. First, the object of the tax must

lack a nexus with the state imposing the tax, and second, the tax must fail to fairly reflect the taxpayer's activity in the taxing state.

Sufficient nexus with the state has already been established under the Commerce Clause section previously discussed. Additionally, we previously found under the fourth prong of the Complete Auto Transit test, that the tax is fairly related to the services provided by the state. Thus, there is no violation of the Due Process Clause.

The Owners contend the Equal Protection Clause invalidates the beneficial use tax because the state has not equally administered the beneficial use taxes. Raymond v. Chicago Union Traction Co. (1907), 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78; and Larson v. State (1975), 166 Mont. 449, 534 P.2d 854. The Owners claim that the Department has never attempted to apply the beneficial use tax in analogous situations, specifically referring to the Montana Rural Electrification Administration Cooperatives (REAs).

These REAs, as preference customers, are entitled to purchase federal power at a preferred or "Priority Firm Rate." This rate is lower than the rate investor-owned utilities are entitled to when they purchase federal power. These REAs also have a right to first call on federal power, before investor-owned utilities. The Owners claim the beneficial use taxes would be applicable to BPA's preference customers based on their use of the BPA transmission system, including the BPA's 500 KV lines. The Owners also contend this is the first attempt to apply the beneficial use tax upon any entity that did not have "exclusive use" of the subject facilities. The Owners equate exclusive use to a requirement that they have possession of the facilities and transmission lines.

The standard which must be achieved to invalidate the tax on equal protection grounds is one of invidious discrimination, as opposed to the existence of a rational relationship. Lehnhausen v. Lake Shore Auto Parts Co. (1973), 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351. The existence of a rational relationship is met here by the intent to close the loophole which would have allowed these companies to avoid paying any taxes. In regard to the Owners' claims regarding the REAs, we note they do not use the Montana Intertie line, nor possess firm transmission demands in 500 KV lines which may be taxed in 1984, under § 15-24-1203, MCA.

We agree with the DOR that the Legislature was not required to

tax all beneficial users before it could reach the beneficial users of 500 KV lines. ("[T]axation of certain objects need not be universal in nature.") Citing to Louisiana v. Pilsbury (1881), 105 U.S. 278, 26 L.Ed. 109. The Legislature in this case has identified beneficial users of 500 KV lines as a distinct tax classification.

THE MONTANA CONSTITUTION

Additionally, the Owners claim the imposition of beneficial use taxes in this case violates three provisions of the 1972 Montana Constitution. The Owners contend that while Art. VIII, sec. 5(1)(a) allows "private interests" in exempt properties to be taxed separately, such a tax necessarily requires the user to have possession. The Owners base this requirement of possession upon statements made at the Constitutional Convention that in closing an existing loophole the delegates provided for taxation of private interests in government-owned property, "things like right-of-ways and things like that . . . ." Further, the Owners contend the Montana Supreme Court, in identifying an "interest" in real property as an estate, has implied one must have the right to possess and control property before beneficial use taxes may be imposed. Brown v. Hart (1984), 213 Mont. 517, 692 P.2d 14.

We disagree. What is involved here is a private contractual right to use a portion of the transmission capacity of the exempt Townsend-Garrison line. This private interest in exempt federal lands fits within the plain language employed by the 1972 Constitutional Convention delegates in closing this loophole contained in the prior constitution.

> (1) The legislature may exempt from taxation:
>
> (a) Property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, but any private interest in such property may be taxed separately.
>
> . . . .

Art. VIII, sec. 5(1)(a), 1972 Montana Constitution.

The Owners next claim that the imposition of beneficial use taxes on their use of the Montana Intertie line violates Art. XIII, sec. 1(3), prohibiting retrospective laws. Specifically the Owners contend that since the Montana Intertie Agreement was entered in 1981 and § 15-24-1203, MCA, was not amended to specifically include 500 KV

transmission lines until 1983, the effect of imposing these taxes is precisely the type of retrospective action the 1972 Constitutional Convention was prohibiting.

We find several problems with the Owners' argument. First, the argument ignores the ongoing nature of their use of these lines. Second, this contention is weakened by Art. VIII, sec. 5(1)(a) which specifically allows for taxation of the interests conveyed to the Owners under the Montana Intertie Agreement. We agree with the District Court that the position the Owners advance would have the effect of prohibiting all new forms of taxation. "The imposition of a new tax, or an increase in the rate of an old one, is simply one of the usual hazards of the business enterprise." Westfield-Palos v. City of Rancho Palos Verdes (Cal.App. 1977), 141 Cal.Rptr. 36, 42, citing John McShain, Inc. v. District of Columbia (D.C. Cir. 1953), 205 F.2d 882, 883.

> Only where the measuring formula for the tax draws upon such disparate or long past antecedents so as to have little relation to the volume of current business might a business license tax fall on retroactivity grounds. (Citations omitted.)

Westfield-Palos, 141 Cal.Rptr. at 42. We find that the beneficial use tax involved here, like the business license tax in Westfield-Palos applies to the ongoing, current business activity of the Owners. As such, the tax does not violate Art. XIII, sec. 1(3), of the 1972 Montana Constitution.

The Owners' final issue relies on Art. II, sec. 31, of the 1972 Montana Constitution in contending the imposition of these beneficial use taxes constitutes an impairment of their contract with the BPA. This argument is without merit as it has long been established that "[a] contract between individuals cannot have the effect of depriving the state or any municipal subdivision of any power of taxation otherwise belonging to it." Forbes v. Mid-Northern Oil Co. (1935), 100 Mont. 10, 22, 45 P.2d 673, 679, citing Newman v. Commercial Waterway District (Wash. 1923), 217 P. 9. As long as the state does not violate a fundamental right of the individual, the state is free to vary the existing mode of taxation. Forbes, 45 P.2d at 679. As Art. II, sec. 31 of the 1972 Montana Constitution is essentially identical to Art. 3, sec. 11 of the 1889 Montana Constitution, under which the Forbes

case was decided, we find the Owners have presented no reason to find there has been any impairment of their contract.

CONCLUSION

The Owners enjoyed a beneficial use interest in the Montana Intertie Agreement 500 KV lines, which use we hold was properly taxable under § 15-24-1203, MCA. That use was evidenced by the Owners' contractual reservation of firm transmission demands in the lines and the fact the lines were constructed for the purpose of transmitting the Owners' electrical power generated at the Colstrip generating facilities. The State's levy of these beneficial use taxes did not violate the United States Commerce Clause, the United States Supremacy Clause, the Fourteenth Amendment to the United States Constitution, nor the cited sections of the Montana Constitution. Therefore we affirm the order of the District Court.

Justice

We concur:

Chief Justice

Justices

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PORTLAND GENERAL ELECTRIC COMPANY,
Plaintiff,

-vs-

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; MINERAL COUNTY; BILLYE ANN BRICKER, Treasurer of Mineral County; SANDERS COUNTY; JUNE M. THAYER, Treasurer of Sanders County; and ED ARGENBRIGHT, Montana State Superintendent of Public Instruction,
Defendants.

Cause No. ADV-86-200

ORDER

This is a proceeding for declaratory and injunctive relief brought under Section 15-1-406, MCA, and Title 27, Chapter 8, MCA, to determine the validity of a beneficial use tax set forth in Section 15-24-1203, MCA, which has been assessed against Plaintiff for the year 1985 with regard to the 500 kV transmission lines between Hot Springs, Montana and the Idaho border.

Plaintiff is Portland General Electric Company (PGE), an Oregon corporation which provides retail electric utility service to customers in Oregon. Defendants are the Montana Department of Revenue (DOR); Mineral and Sanders counties; Billye Anne Bricker and June M. Thayer, the county treasurers of the above counties; and Ed Argenbright, State Superintendant of Public Instruction.

Most of the background of this case is the same as that set forth on pages 3-22 of this Court's Order in Cause No. 50978 dated December 21, 1987. The additional facts relevant to this case are set forth below.

Because PGE and the other Colstrip Owners "requested Bonneville to provide adequate transmission facilities and services west of Garrison, Montana to transmit to Colstrip power on a firm basis over the Federal Transmission system to their system loads and [because] Bonneville .... agreed to provide such transmission facilities and services," PGE and the Bonneville Power Administration (BPA) entered into the Garrison West Agreement on April 17, 1981. (Plaintiff's Exhibit 14 in Cause No. 50978 at 2 - 3) Under such Agreement, PGE made available and BPA was required to accept scheduled power not to exceed the reserved transmission demand set forth on Exhibit D of the Agreement. Exhibit D provided that from the effective date of the exhibit [the date of commercial operation of Colstrip Unit No. 3, i.e., October of 1983 — See Pretrial Order at 5] until the date when a 500 kV transmission line connecting Garrison to the Federal 500 kV main transmission system at or west of Hot Springs first became available for scheduling power, (i.e., 1986) the transmission demand for PGE was 0 kV. However, according to the footnote following this transmission demand of zero, PGE was to advise BPA of its transmission demand by April 6, 1982. The footnote also provided that the sum of the Colstrip Owners' transmission demands was limited to 330 megawatts.

On December 20, 1983, Richard Cromer of the Montana Power Company (one of the Colstrip Owners) wrote to Thomas Noguchi of

BPA as follows:

> The Colstrip Owners have just recently reached agreement on the following allocation of BPA's 330 MWs:
>
> > Effective for the period beginning at 2400 hours on the date of commercial operation of Colstrip No. 3 and ending at 2400 hours on the date when a 500 kV line connecting Garrison to the Federal 500 kV main transmission system at or west of Hot Springs (Taft) first becomes available for scheduling power; the agreed upon allocation of Bonneville's 330 MW transfer capability is:

Company	Bonneville Contract No.	Transmission Demand
. . .		
Portland	DE-MS79-81BP90167	65MW

(Defendants' Exhibit 3 in Cause No. 86-200)
BPA responded on February 14, 1984 stating:

> This is to confirm that each of your companies . . . . has sent BPA a letter agreeing with the allocation, contained in Montana Power Company's letter dated December 20, 1983, of the 330 MW of transmission capacity available to the Colstrip owners on BPA's Garrison-Hot Springs transmission line during the period starting with commercial operation of Colstrip Unit No. 3 and ending at 2400 hours on the date when the Garrison-Taft 500 kV transmission line is available for scheduling power, pursuant to existing contracts for wheeling Colstrip power.
>
> . . .

Company	Bonneville Contract No.	Transmission Demand
. . .		
Portland	DE-MS79-81BP00167	65MW

(Defendants' Exhibit No. 2 in Cause No. 86-200) (Emphasis supplied) According to Plaintiff's Exhibit 35 [Cause No. 86-200], Exhibit D of PGE's Garrison West Agreement was subsequently revised to show a transmission demand of 65 MW.

The term of PGE's Garrison West Agreement is 22 years and PGE has the right to renew. PGE had no other agreement for the transmission of its Colstrip power to points west. After scheduling over the Hot Springs to border lines began in October of 1983, PGE became obligated to pay a monthly charge to BPA calculated pursuant to the terms of the Agreement.

The term of PGE's Garrison West Agreement is 22 years and PGE has the right to renew. PGE had no other agreement for the transmission of its Colstrip power to points west. After scheduling over the Hot Springs to border lines began in October of 1983, PGE became obligated to pay a monthly charge to BPA calculated pursuant to the terms of the Agreement.

In 1985, PGE submitted a report pursuant to Rule 42.22.107, ARM, stating that it "had no possession or use of a government-owned transmission line in 1984; it had only a contract right to certain services provided by Bonneville Power Administration ("Bonneville") on the 500-kilovolt transmission line of Townsend-to-Garrison and Hot Springs-to-Idaho border. (Defendants' Ex. 28, Cause No. 50978) (Emphasis supplied) DOR assessed the Hot Springs to border line based on such report. (Tr. at 226) Ms. Whittinghill did not receive reports from any of the other Colstrip Owners or any other entities with respect to the use of this portion of the line during 1984. (Tr. at 228) With regard to BPA's preference customers, namely cooperatives, Ms. Whittinghill stated that it was not DOR's "impression that any cooperatives were wheeling or using these power lines to transfer their own power on these government lines." (Tr. at 259)

DOR prepared a beneficial use tax assessment for PGE for 1985 using the unit approach. Unlike its assessment in Cause No. 50978, DOR, in its first assessment of the Hot Springs to border lines, capitalized payments made by PGE to BPA in 1984. However, after deposing several PGE and BPA officials in 1986, DOR and PGE learned that BPA's charges represented charges for use of both 230 and 500 kV lines. DOR then issued a revised assessment excluding the 230 kV lines. Ms. Whittinghill testified as follows:

> This time in order to — this time in order not to have any 230 kV line charges included in our assessment we asked them to provide us specifically with detailed cost information on charge or installed cost of the entire portion of the Dworshak to Hot Springs power line located within the State of Montana.

(Tr. at 244)

Ms. Whittinghill determined the cost of the Hot Springs to border line at about $11,500,000 on the basis of Defendants' Exhibit 1 — "Plant Investment, Analyzed Plant by Work Order Number" dated October 21 and 22, 1986. (Tr. at 244-249) Then, as per the information provided by Mr. Eskridge of BPA, she awarded 13 years of depreciation based upon a 35-year life. (Id.) After depreciation, the line was valued at about $7,000,000. (Tr. at 249) Then, based upon Mr. Eskridges's statement that the "total transmission capacity is 1,300 megawatts" [see Defendants' Exhibit 22] and the firm reserved transmission demand of 65 MW [see p. 4 of this Opinion], Ms. Whittinghill obtained a 5% figure ($^{65}/_{1300}$). Ms. Whittinghill then "multiplied five percent, which is the relationship of their (PGE's) use of that line to the total capacity, times the total depreciated cost of that line to determine Portland General Electric's value for that line for 1985." (Tr. at 250-1) The result was $360,365. As in Cause No. 50978, DOR incorporated such amount into the cost indicator which was then weighted by 40% and added to the income and stock and debt indicators. (See Defendants' Exhibit 17) The resulting figure was multiplied by the percentage of PGE's value subject to assessment in Montana and then apportioned to each of the appropriate taxing jurisdictions.

Ms. Whittinghill testified that she did not include any influence or effect of the utilization of a 230 kV transmission line property because she "only utilized the total cost of the Dworshak [Hot Springs] line." (Tr. 255) Ms. Whittinghill also testified:

> It was our understanding initially that from conversations with Bonneville Power representatives that the Dworshak power line in fact had to be used to transfer power outside of Montana, if the power companies were

not having some type of wheeling arrangements with either Montana Power or Washington Water Power, that in fact that the Dworshak line would have been – in their assumption of their contract path or whatever would have been in there, and that is why our assumptions have the Dworshak line as being used.

(Tr. at p. 271)

Q .... I would like to refer that back to you and ask you why you assumed in 1985 that Dworshak was the only line for which – which would be used by Bonneville to make the deliveries under the Garrison West contract?

A. Well if we want to back up, I would say that the first indication that I had that – from Portland General Electric, that the power line was being utilized, was their report to the department that specifically broke down their allocated use of the line based on charges. At that point it was really not known that the 230 kV charges were included in those wheeling or contract charges that Portland General Electric was paying to Bonneville. It was also then through conversations with Bonneville personnel indicated to the department that that would be basically the assumed contract path for purpose of determining the airline miles to transmit Colstrip power out of Montana.

(Tr. at p. 280)

In responding to DOR's inquiries, PGE stated as follows:

BPA's transmission service charges paid as they relate to the Colstrip Unit #3 project are as follows:

$3,380,840 Townsend Substation to Garrison Substation

$1,300,377 Garrison Substation to Pearl Substation (in Oregon)

Since the physical wheeling of energy is not specific as to which lines the energy transmits over but rather the energy can be traveling over various lines as long as the final end result or delivery point is to where our contracts

> specify, PGE cannot proportion the exact service charges for the transmission lines in the State of Montana. However, if one can say that the wheeling of power is transmitted over the most direct transmission line to the delivery point, then all Townsend-Garrison service charges and an estimated 63 miles of 632 miles of the Garrison-Pearl service charges relate to the State of Montana government lines 500 kV or greater.
>
> BPA's intertie wheeling charges for Colstrip in 1984 is $574,298 for power transmitted from Hot Springs Substation to Pearl Substation. Again, if the most direct pathways are used, then an estimated 63 miles of the total estimated 500 miles of the charges relate to the State of Montana government transmission lines 500 kV or greater.

(Plaintiff's Exhibit 36)

And, as quoted earlier in this Opinion, PGE also stated that it "had only a contract right to certain services provided by Bonneville Power Administration .... on the 500-kilovolt transmission line of .... Hot Spring-to-Idaho border." (Plaintiff's Exhibit 29)

Lastly, as stated in this Court's Opinion in Cause No. 50978: "The choice for long distance transmission, i.e., over 100 miles, would be the highest voltage line which, in the case of BPA's system, would be 500 kV."

Plaintiff sets forth eight counts alleging that the imposition of the beneficial use tax is illegal. Seven of the counts are the same or very similar to the seven counts set forth in Cause No. 50978. This Court's Opinion in Cause No. 50978 is equally applicable to the seven counts raised in this Cause No. 86-200. PGE has a clearly distinguishable use interest in the Hot Springs to border 500 kV line. Plaintiffs first seven counts fail as per the reasoning set forth in the Opinion dated December 21, 1987 in Cause No. 50978.

In Count 8 of its Complaint, PGE contends that the beneficial use tax is illegal in that it taxes BPA lines of under 500 kV which are statutorily exempt from taxation. However, the testimony of the witnesses and the parties' exhibits indicate otherwise. Plaintiff's eighth claim also fails.

Plaintiff has not sustained its burden of proving that the imposition of beneficial use taxes pursuant to Section 15-24-1203, MCA, violates any statutory or constitutional rights. Therefore, this Court finds that such taxes have been lawfully imposed. Such taxes shall be disbursed from the protest accounts in which they are presently being held and shall be distributed as per Section 15-1-402, MCA.

IT IS SO ORDERED:

DATED this 19th day of January, 1988.

_____

DISTRICT JUDGE

pc: Counsel of record

No. 88-160

IN THE SUPREME COURT OF THE STATE OF MONTANA

1989

PORTLAND GENERAL ELECTRIC COMPANY,
Plaintiff and Appellant,

-vs-

MONTANA DEPARTMENT OF REVENUE,
et al.,
Defendants and Respondents.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis & Clark, The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Donald R. Murray; Murphy, Robinson, Heckathorn & Phillips
Kalispell, MT

Thomas H. Nelson argued; Stoel, Rives, Boley, Jones & Grey,
Portland, Oregon

For Respondent:

Larry G. Schuster argued, Department of Revenue, Helena, Montana

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Submitted: February 28, 1989
Decided: May 10, 1989

Mr. Justice John Conway Harrison delivered the Opinion of the Court.

Appellant, Portland General Electric (hereinafter PGE), appeals an order entered by the Honorable Henry Loble, First Judicial District Court, Lewis and Clark County, Montana, denying injunctive and declaratory relief. We afffirm.

This case concerns the imposition of beneficial use taxes, pursuant to § 15-24-1203, MCA (1983), for appellant's use of the Hot Springs to Idaho Border portion of the BPA 500 kilovolts (KV) transmission line system within the State of Montana.

> [T]here is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation .... The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax.

Section 15-24-1203, MCA.

Much of the factual background surrounding this case has previously been discussed in our decision, Pacific Power & Light Co. v. Department of Revenue, No. 88-151, decided April 17, 1989. Therefore, we will limit the extensive background discussion and instead focus on the additional facts relevant to this case.

PGE is an investor-owned utility which provides retail electric utility service to customers located in the State of Oregon. PGE owns an undivided 20% interest in Colstrip Units III and IV, which began operation in October of 1983 and 1985, respectively. The other four Colstrip owners are Pacific Power & Light Company, Washington Water Power Company, Puget Sound Power & Light Company, and Montana Power Company. Collectively, these companies are referred to as the "Colstrip Owners."

With the development of Colstrip Units III and IV, additional transmission capacity was needed from the Colstrip facilities to the west. To accommodate the increased generation, Colstrip Owners initially

converted one 230 KV line extending from the generating facilities to a substation near Broadview, Montana, to 500 KV and constructed a second 500 KV line. From the Broadview substation, the Colstrip Owners' 500 KV lines extend westward to a point near Townsend, Montana. At Townsend, the Colstrip Owners' 500 KV lines interconnect with the Bonneville Power Administration's (BPA) 500 KV lines. The portion extending from Townsend to the BPA's Garrison substation is referred to as the Montana Intertie, and is extensively discussed in our previous opinion, Pacific Power & Light Co. In 1986, anticipating the completion of Colstrip Unit IV, the BPA, at the request of the Colstrip Owners, completed the Garrison-West lines connecting the Garrison substation to the Taft, Montana, substation and points to the west. Prior to the completion of the Garrison-Taft 500 KV transmission lines, the Hot Springs-Dworshak lines were the only existing 500 KV lines providing access to the west.

From the BPA substation at Garrison, Montana, the transmission of Colstrip power is governed by separate contracts, commonly referred to as the Garrison-West Agreement. These contracts continue for a period of 22 years, with a right to renew at comparable terms. Under each Owners' separate contract with the BPA, power would be introduced at the Garrison substation and transmitted across the entire BPA "main grid" which included both 230 and 500 KV lines. Notably, appellant entered into no other agreement for the transmission of its Colstrip power to points west.

Under the terms of PGE's agreement with the BPA, PGE requested BPA provide adequate transmission facilities west of Garrison, Montana, to transmit power on a firm basis over the Federal Transmission System to PGE's system load at the Pearl substation in Oregon. PGE made available and BPA was required to accept scheduled power not to exceed the reserved transmission demand set forth on Exhibit D of the Garrison-West Agreement. Exhibit D provided that from the date of commercial operation of Colstrip Unit III until the date when the 500 KV transmission lines connecting Garrison to the Federal 500 KV transmission system first became available for scheduling power (the Garrison-Taft lines), the transmission demand for PGE was zero. However, a footnote to Exhibit D provided for the five Colstrip owners to allocate BPA's available 330 megawatts transmission capacity.

At this point, a brief explanation describing the 330 megawatt limitation is in order. From the Garrison substation to points west, the BPA lacked transmission line capacity to accomodate full transmission of Colstrip power to the Owners' individual system loads. This lack of transmission capacity is due to a gap in the 500 KV lines between the Garrison substation and the Hot Springs substation, referred to in this litigation as the "bottleneck." Between the two substations, the BPA had only 230 KV lines, which proved insufficient to accommodate the total scheduled Colstrip power. Recognizing its inability to fulfill obligations under the Garrison-West Agreements, the BPA imposed a 330 megawatt limitation upon the amount of power which could be scheduled west of the Garrison substation, until the Garrison-Taft 500 KV lines were completed.

On December 20, 1983, a Montana Power Company representative contacted BPA officials indicating Colstrip Owners had reached an agreement on the allocation of BPA's 330 megawatts. Respectively, PGE was allocated 65 megawatts transmission demand. The reserved amount is reflected in a revised Exhibit D to the PGE's Garrison-West Agreement. In turn, the BPA responded on February 4, 1984, stating:

> This is to confirm that each of your companies [Colstrip Owners] has sent BPA a letter agreeing with the allocation, contained in The Montana Power Company's letter dated December 20, 1983, of the 330 MW of transmission capacity available to the Colstrip owners on BPA's Garrison-Hot Springs transmission line during the period starting with commercial operation of Colstrip Unit No. 3 and ending at 2400 hours on the date when the Garrison-Taft 500 kV transmission line is available for scheduling power, pursuant to existing contracts for wheeling Colstrip power.
>
> . . .
>
> | Company | Bonneville Contract No. | Transmission Demand |
> |---|---|---|
> | . . . | | |
> | Portland | DE-MS79-81BP00167 | 65 MW |

Once scheduling of Colstrip power over the Hot Springs to border line began, PGE was required to pay BPA a monthly charge calculated pursuant to the terms of the Garrison-West Agreement. The transfer of energy was "deemed" to have occurred whether or not there was actual physical transmission. Therefore, the monthly charge was due BPA regardless of PGE's actual transmission flow across the lines.

Beginning in the tax year 1985, the Department of Revenue (DOR) imposed taxes upon appellant for its "beneficial use" of the BPA 500 KV transmission lines from Hot Springs to the Idaho border. The assessment was based upon a report submitted by PGE, pursuant to Rule 42.22.107, ARM, stating that it"had no possession or use of a government-owned transmission line in 1984; it had only a contract right to certain services provided by the Bonneville Power Administration ("Bonneville") on the 500-kilovolt transmission line" between Townsend-to-Garrison and Hot Springs-to-Idaho border. The other Colstrip Owners did not submit similar reports to the DOR. The DOR prepared a beneficial use assessment for PGE using the unitary approach. Initially, the DOR assessed PGE's use of the Hot Springs to border lines based upon the capitalized payments made by PGE to the BPA in 1984. However, shortly before trial, depositions revealed such payments represented charges for the use of both 230 and 500 KV lines. Thereafter, the DOR prepared a revised assessment excluding the effect of tax-exempt 230 KV lines.

Appellant presents eight issues on appeal, each of which would invalidate the imposition of the challenged taxes. Three of the issues arise under the United States Constitution, three under the Montana Constitution and two are statutory challenges. However, our decision in Pacific Power & Light Co. forecloses appellant's arguments of the first seven issues. Therefore, our opinion will deal exclusively with appellant's eighth issue contending that a portion of the beneficial use tax assessment was attributable to exempt property.

This case comes to us against a backdrop of extensive technological changes in the electrical transmission industry. Goldberg v. Sweet (1989), _____ U.S. _____, 109 S.Ct. 582, 102 L.Ed.2d. 607. As noted in the factual discussion, BPA's entire integrated network

is used to schedule power. The power transmitted across electrical lines can not be accurately identified, and indeed, the path taken is often indirect and bears no relation to contract requisites. Instead, we have only the input point and the eventual withdrawal of energy at a specified location. Between the two, various factors indicate a likely, though not actual, transmission path.

Initially, we discuss our determination that PGE possessed a "beneficial use" within the meaning of the statute. Contrary to appellant's argument, no physical possession, exclusive use or control of the facilities is necessary. Rather, "beneficial use" has long been defined as a right recognized by law and enforceable by the courts.

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf.

Montana Catholic Missions v. Missoula County (1906), 200 U.S. 118, 127-128, 26 S.Ct. 197, 200, 50 L.Ed. 398, 402; See also Harrison v. City of Missoula (1965), 146 Mont. 420, 407 P.2d 703; Pacific Power & Light Co. To advance its commercial activities, and thereby increase profits, PGE contracted for firm transmission capacity over the BPA lines. This is an enforceable contract interest in firm megawatts of power. While PGE may not possess the lines, nonetheless, the power flowing through the lines remain under PGE's ownership. Finally, PGE pays for the use of the lines regardless of the actual transmission flow. We find the reservation of firm transmission demand grants PGE an exclusive right taxable under § 15-24-1203, MCA.

The physical wheeling of energy is not specific as to which line it passes through, but rather the energy can travel through various lines as long as the delivery point is where the contract specifies. However, the facts reflect the essential nature of the Hot Springs-Dworshak lines. PGE contracts to transmit bulk transfers of power, necessitating the use of the higher voltage, lower impedance, 500

KV lines. Without the Hot Springs lines, the transfer capability of Colstrip power to the west would be substantially affected. Indeed, BPA officials indicated that it could not fulfill contract obligations absent the Hot Springs lines. Clearly, the Hot Springs lines are a vital portion of the BPA's main grid.

Appellant contends the DOR's assessment erroneously assumed that only 500 KV facilities would be used in providing services, ignoring the fact that a substantial portion of the transmission facilities consist of tax exempt 230 KV lines. PGE argues that in reality, the power is scheduled over the entire BPA transmission system and generally no line or path is associated with a particular power schedule.

The 500 KV lines from Hot Springs to the Idaho border are in the direct transmission path of PGE's bulk energy transfers to its Pearl substation. It is significant to note that no 230 KV lines exist parallel to the 500 KV lines. This fact strengthens the assumption that the 500 KV lines are essential to PGE's energy transfers in this case, and are properly taxed.

It is not disputed that the DOR did not rely on actual transmission flows. Rather, the assessment was based exclusively upon PGE's Garrison-West Agreement with the BPA providing for firm transmission rights. To eliminate any influence of 230 KV lines in the assessment, the DOR requested BPA to provide detailed information regarding the actual cost of the installed Hot Springs lines located within the State of Montana, and information regarding the total capacity of the lines and date of installation. From the total cost, the DOR applied a straight line depreciation to the amount, awarding 13 years depreciation based upon a 35 year life. To the depreciated cost, the DOR multiplied a fraction isolating PGE's interest in the lines, (denominator represents the lines' capacity; and the numerator consists of PGE's firm transmission demand). This value was then integrated into PGE's centralized assessment, and thereby subject to a 40% weighting figure which the DOR ascribes to the cost indicator. Puget Sound Power and Light Co. v. Department of Revenue (Mont. 1988), 761 P.2d 336, 45 St.Rep. 1078.

A tax for the beneficial use of property, as distinguished from a tax on property itself, is commonplace. Likewise, the United States

Supreme Court decisions support a tax measured by the value of the tax-exempt property:

> In measuring such a use tax it seems neither irregular nor extravagent to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold .... In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for [the State] to compute its tax by the value of the property used.

United States v. City of Detroit (1958), 355 U.S. 466, 470, 78 S.Ct. 474, 476, 2 L.Ed.2d 424, 427; United States v. Boyd (1964), 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713.

Reviewing the facts, we conclude that the tax was imposed on the privilege of using the property. The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby ignoring actual flows and the lines' west to east transmission capacity.

Affirmed.

_____

Justice

We concur:

_____

Chief Justice

_____

_____

_____

_____

Justices

Supreme Court, U.S.
FILED
SEP 29 1989
JOSEPH F. SPANIOL, JR.
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No. 89-364

In The

Supreme Court of the United States

October Term, 1989

PACIFIC POWER AND LIGHT COMPANY, et al.,

Petitioners,

v.

THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED

1. May the State of Montana impose beneficial use taxes upon the Colstrip owners for their use of the Montana Intertie, a 500 kv transmission line system, which was designed and is operated to transmit private power on a bulk power basis, while recognizing the lower voltage transmission lines are not used for a similar purpose?

2. May the State of Montana impose beneficial use taxes upon the Colstrip owners for their use of the Montana Intertie, while recognizing that electric cooperatives do not use the same facilities?

3. May the State of Montana impose beneficial use taxes upon the Colstrip owners for their use of the Montana Intertie, and may it impose similar beneficial use taxes upon users of state owned tax exempt property?

4. May the State of Montana impose beneficial use taxes upon the Colstrip owners for their use of the Montana Intertie, recognizing (1) that the Colstrip owners have reserved the use of the Montana Intertie for a period of at least 21 years pursuant to a firm transmission contract; (2) that the Colstrip owners specifically transmit Colstrip power over the Montana Intertie for a dominant commercial purpose; and (3) that the Colstrip owners have contractually assumed the "impact aid" payments under the terms of the Montana Intertie Agreement?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CASES AND AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

A. THE FACTS 1

B. THE PROCEEDINGS IN STATE DISTRICT COURT 8

C. THE MONTANA SUPREME COURT DECISION 9

REASONS WHY THE WRIT SHOULD BE DENIED 9

A. THE COMMERCE CLAUSE: THE IMPOSITION OF MONTANA'S BENEFICIAL USE TAX UPON THE COLSTRIP OWNERS FOR THEIR USE OF THE MONTANA INTERTIE DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE 11

B. THE SUPREMACY CLAUSE: MONTANA'S BENEFICIAL USE TAXES ARE NOT PREEMPTED BY THE IMPACT AID PROVISIONS OF THE 1980 REGIONAL ACT, NOR ARE THEY PREEMPTED BY 15 U.S.C. § 391. THE DOCTRINE OF IMPLIED PREEMPTION IS INAPPLICABLE 18

TABLE OF CONTENTS – Continued

Page

1. Impact Aid was never intended to preempt beneficial use taxation. 15 U.S.C. § 391 is not applicable to Montana beneficial use taxation 19

a. The Impact Aid provisions of the 1980 Regional Act 19

b. 15 U.S.C. § 391 is not applicable 21

2. Beneficial use taxation of the use of the Montana Intertie is fully justified by this Court's Supremacy Clause cases 22

C. THE FOURTEENTH AMENDMENT: MONTANA'S BENEFICIAL USE TAX STATUTE IS FULLY CONSISTENT WITH THE GUARANTEES OF THE EQUAL PROTECTION AND THE DUE PROCESS CLAUSES 27

CONCLUSION 29

TABLE OF CASES AND AUTHORITIES – Continued

Page

CASES

A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934)..... 27

Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, ___ U.S. ___, 109 S.Ct. 633 (1989)..... 11, 16

Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959) 15, 27

Appalachian Power Co. v. Federal Power Commission, 382 F.2d 237 (4th Cir. 1964), cert. denied 379 U.S. 829 (1964)..... 12

Arizona Public Service Commission v. Snead, 441 U.S. 141 (1979)..... 21

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937)..... 21

Carson v. Roane-Anderson Co., 342 U.S. 232 (1952).... 20

City of Detroit v. Murray Corp., 355 U.S. 489 (1958).... 24

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981).....9, 11, 17, 18, 21

Complete Auto Transit v. Brady, 430 U.S. 274 (1977)..9, 17

D.H. Holmes Co. v. McNamara, ___ U.S. ___, 108 S.Ct. 1619 (1988)..... 13, 18

TABLE OF CASES AND AUTHORITIES – Continued

Page

Department of Revenue v. Montana Stockgrowers Ass'n, 777 P.2d 285 (1989) 15

Department of Revenue v. Puget Sound Power & Light Co., 587 P.2d 1282 (1978)..... 15

General Talking Pictures v. Western Electric Co., 304 U.S. 175 (1938)..... 2

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 24

Hillsborough County v. Automated Medical Laboratories Inc., 471 U.S. 707 (1985)..... 10

International Paper Co. v. County of Siskiyou, 515 F.2d 285 (9th Cir. 1974)..... 25

James v. Dravo Contracting Co., 302 U.S. 134 (1937) 23

Lehnhausen v. Lakeshore Auto Parts Co., 410 U.S. 356 (1973)..... 11, 27

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)..... 23

Miller Bros. v. Maryland, 347 U.S. 340 (1954)..... 11, 27

Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906)..... 24

Norfolk & Western Ry. Co. v. Missouri State Tax Commission, 390 U.S. 317 (1968) 27

TABLE OF CASES AND AUTHORITIES – Continued

Page

Ottertail Power Co. v. United States, 410 U.S. 366 (1973) 14

Pacific Power & Light Co. v. Department of Revenue, 773 P.2d 1176 (1989) 1, 2, 9, 10, 13, 14, 16, 21, 24, 26, 28

Portland General Electric Co. v. State Tax Commission, 437 P.2d 827 (1968) 25

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 21

Southern Power Co. v. North Carolina Public Service Commission, 263 U.S. 508 (1924) 14

State v. Burbank, 691 P.2d 845 (1984) 22

United States v. Boyd, 378 U.S. 39 (1964) 10, 24

United States v. City of Detroit, 355 U.S. 466 (1958) 24, 25

United States v. City of Manassas, 830 F.2d 530 (4th Cir. 1987) aff'd, 108 S.Ct. 1568 (1988) 16

United States v. County of Allegheny, 322 U.S. 174 (1944) 23, 25, 26

United States v. County of Fresno, 429 U.S. 452 (1977) 10, 11, 19, 23, 24, 25, 26, 28

United States v. Hawkins County, Tennessee, 859 F.2d 20 (6th Cir. 1988) cert. denied, 109 S.Ct. 1638 (1989) 25, 26

United States v. New Mexico, 455 U.S. 720 (1982).....10, 23

TABLE OF CASES AND AUTHORITIES – Continued

Page

United States v. Township of Muskegon, 355 U.S. 484 (1958) 24

Walters v. City of St. Louis, 347 U.S. 231 (1954) 16

CONSTITUTIONAL PROVISIONS

Article I, section 8, clause 3 of the United States Constitution (Commerce Clause) 11

Article VI, clause 2 of the United States Constitution (Supremacy Clause) 18

Fourteenth Amendment to the United States Constitution 27

STATUTES AND RULES

15 U.S.C. § 391 ..... 10, 18, 19, 21, 22

Bonneville Project Act, 16 U.S.C. § 832(b) 14

16 U.S.C. § 832c 14

Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839 19

16 U.S.C. § 839c(a) 14

16 U.S.C. § 839c(e) 14

16 U.S.C. § 839e(m) 5, 10, 19

16 U.S.C. § 839g(c) 14

Atomic Energy Act of 1954, 42 U.S.C. § 2208 20

48 Fed. Reg. 55764 (December 15, 1983) 21

48 Fed. Reg. 55765 (December 15, 1983) 19

Mont. Code Ann. § 1-2-201 (1983) 16

Mont. Code Ann. § 15-6-134 (1983) 26

Mont. Code Ann. § 15-6-135 (1987) 15, 16

TABLE OF CASES AND AUTHORITIES – Continued

Page

Mont. Code Ann. § 15-6-141(1)(a) (1981) 16
Mont. Code Ann. § 15-6-141 (1983) 16
Mont. Code Ann. § 15-23-101 (1983) 10, 12, 13
Mont. Code Ann. § 15-24-1203 (1983) 2, 8, 10, 12, 13, 16, 28
Mont. Code Ann. § 15-24-1203 (1987) 16
Mont. Code Ann. § 26-1-401 (1983) 28
Mont. Code Ann. § 26-1-402 (1983) 28
Chapter 478, Montana Laws (1981) 16
Chapter 683, Montana Laws (1983) 8

LEGISLATIVE MATERIALS

Minutes of Montana House Taxation Committee (March 1, 1983) 13

MISCELLANEOUS MATERIALS

Ronald D. Rotunda, Sheathing the Sword of Federal Preemption, 5 Constitutional Commentary 311 (1988) 18

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

The Respondents, the Department of Revenue of the State of Montana, seven Montana counties, their respective Treasurers, and the Montana State Superintendent of Public Instruction, respectfully request that this Court deny the Petition for a writ of certiorari to the Montana Supreme Court to review its decision in *Pacific Power and Light Company, et al. v. Department of Revenue*, ___ Mont. ___, 773 P.2d 1176 (1989).

OPINIONS BELOW

This case represents the first beneficial use tax case tried before the Honorable Henry Loble, District Judge for the First Judicial District, Lewis and Clark County, Montana. Petitioners' Appendix 13a. The decision of the District Court was affirmed by the Montana Supreme Court on April 17, 1989. Petitioners' Appendix 35a. The Petitioners herein (Colstrip owners) petitioned the Montana Supreme Court for rehearing. The Petition for Rehearing was denied on June 1, 1989.[1]

STATEMENT OF THE CASE

A. The Facts

The essential facts have long been disputed by the parties. The factual controversy was entirely resolved against the Colstrip owners by the Montana Supreme Court. The continuing effort of the Colstrip owners to relitigate the facts, is a

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[1] The Petition for rehearing by the Colstrip owners was partially withdrawn by letter to the Montana Supreme Court dated June 1, 1989. The Colstrip owners recognized that their contention concerning amortization of the cost of the Montana Intertie, through payment of the Montana Intertie charge, had been erroneous for 4½ years.

sufficient reason for denying the writ. *General Talking Pictures v. Western Electric Co.*, 304 U.S. 175 (1938).[2]

The essential facts concerning development of the 500 kv transmission line system from Townsend, Montana to the Garrison Substation (the Montana Intertie), are set forth in the *Pacific* Opinion. During the early 1970's, the Colstrip owners planned the development of Colstrip Units 3 and 4. Each unit produces 700 megawatts of net power. That additional power could not be reliably transmitted over the Montana Power Company and the Bonneville Power Administration (BPA) existing 230 kv transmission line systems. Accordingly, the 500 kv transmission line system, including the Montana Intertie, was engineered, developed and constructed. BPA stated in its final Environmental Impact Statement entitled "Garrison – Spokane 500-kV Transmission Project" dated March 1983:

> In 1971, the Montana Power Company (MPC) agreed with Puget Sound Power and Light Company, Portland General Electric, the Washington Water Power Company, and Pacific Power and Light to submit a proposal to the State of Montana to build two 700-MW coal-fired generating units to supplement the two smaller MPC units at Colstrip, Montana. Coal would be supplied by the MPC-owned Rosebud coal mine in Colstrip. Of the total power generated by Units 1-4, about 1310 MW were to be conveyed approximately 430 miles west on two new parallel 500-kV lines from Colstrip to the Bonneville Power Administration (BPA) system at BPA's Hot Springs Substation in western Montana. There the output could be integrated into Bonneville Power Administration's Federal Columbia

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[2] The Colstrip owners raised a factual challenge in their complaint in *Pacific Power & Light Co. v. Department of Revenue*, No. 50978. Count Seven of the Complaint alleged that they did not use the Montana Intertie within the meaning of Mont. Code Ann. § 15-24-1203 (1983). (Resp. App. 1). The Montana Supreme Court specifically held against them on that factual issue. *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176, 1180 (1989).

River Transmission System. (Def. Ex. 36, Vol. I, Pg. I-2).

Long before the Montana Intertie was energized during October 1983, the Colstrip owners were planning for the efficient transmission of Colstrip power across Montana. The process involved several divisible steps. According to Montana Power Company's (MPC) witness, Mr. Brush, MPC had difficulty securing the right-of-way for the 500 kv lines across Montana. (Brush Tr. Pg. 238).[3] Recognizing that the 500 kv system was a condition precedent to successful operation of Colstrip Units 3 and 4, the Colstrip owners requested that BPA complete a portion of the 500 kv system in Montana.[4]

The 500 kv system across Montana was completed in three segments. The Colstrip owners designed and constructed the segment of the 500 kv system from the Colstrip generating facilities in Rosebud County, Montana, to a point near Townsend, Montana. They own, operate and transmit power across that portion of the system pursuant to the terms of the Colstrip Project Transmission Agreement.[5] That segment of the system was first energized during March 1983. Second, BPA was responsible for construction of the 500 kv system from Townsend to the Garrison Substation. In order to provide for the use of the Montana Intertie, the Colstrip owners and BPA

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[3] Mr. Brush was MPC's electrical engineering witness. He is intimately familiar with the Montana 500 kv transmission line system since he is employed at MPC's control center in Butte, Montana.

[4] The Chief Executive Officer of the Montana Power Company wrote to the Administrator of BPA on September 26, 1977 to formally request that the 500 kv transmission line system be completed to the Hot Springs Substation. (Def. Ex. 44).

[5] The Colstrip project transmission agreement is a contract between the five Colstrip owners providing for ownership and operation of the 500 kv system from Colstrip to Townsend.

entered into an agreement referred to as the Montana Intertie Agreement.[6]

The Montana Intertie secures a valuable use interest to the Colstrip owners. From October 1983 through January 23,

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[6] Transmission Agreement executed by the United States of America, Department of Energy, acting by and through the Bonneville Power Administration and Montana Intertie users (Colstrip project).

> WHEREAS the companies collectively own the output of Units 3 and 4 of the Colstrip Thermal Generating Plant; and
>
> WHEREAS Puget and Montana collectively own the output of Units 1 and 2 of the Colstrip Thermal Generating Plant; and
>
> WHEREAS Bonneville and the Companies except Basin Electric plan to execute firm transmission agreements . . . (referred to herein as the Colstrip Transmission Agreements) to transmit their shares of Colstrip power over the Federal Transmission System to points of delivery specified in the Colstrip Transmission Agreements; and
>
> . . .
>
> WHEREAS Bonneville and the Companies have agreed to build a regional transmission intertie (Montana Intertie) between the Companies' Broadview Substation (Broadview) and a new substation (Garrison) in the vicinity of Deer Lodge, Montana; such Garrison Substation will join the Montana Intertie to the existing Federal Transmission System; and
>
> WHEREAS Bonneville plans to construct the section of the Montana Intertie between Garrison and a point near Townsend, Montana (Townsend) and recover the cost thereof as separately identified portion of the Federal Transmission System, and the Companies plan to construct the section of the Montana Intertie between Townsend and Broadview pursuant to an agreement among the Companies (Colstrip Project Transmission Agreement); and . . . (Pl. Ex. 7).

1986, the only use of the Montana Intertie was for the transmission of Colstrip power.[7] The Montana Intertie Agreement provides for firm transmission rights in favor of the Colstrip owners. Firm transmission means that the transmission of Colstrip power is continuous and that it may not be interrupted.[8] No entities other than the Colstrip owners have firm contracts regarding use of the Montana Intertie. The Colstrip owners pay an Intertie charge to BPA on a monthly basis for the use of the Intertie. It includes BPA's costs of labor, operation, maintenance, its costs of money, and the repayment of the impact aid payments made to Montana Counties.[9] In exchange for the Intertie charge, the Colstrip owners have the unfettered right to use 90% of the east-west capacity of the Montana Intertie for a period of at least 21 years. (Pl. Ex. 7, Ex. D).

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[7] Pursuant to an agreement between Western Area Power Administration and BPA, the Federal Government deferred any use of the Montana Intertie in favor of the Colstrip owners. BPA recognized the limited transmission capacity west of the Garrison Substation, until the Garrison to Taft 500 kv system was completed. (Pl. Ex. 11).

[8] Colstrip power is referred to as Project Scheduled Power under the Montana Intertie Agreement. (Pl. Ex. 7, Pg. 4).

[9] The Intertie charge is set forth in Exhibit E to the Intertie Agreement. It provides that the Colstrip owners have contractually agreed to repay any monies Bonneville might expend under Public Law 96-501. Impact aid payments were authorized by virtue of 16 U.S.C. § 839e(m).

Transmission Demands	Share of Project Output			East to West Transmission Demand	West to East Transmission Demand
	Units 1 & 2	Unit 3	Unit 4		
MPC	330,000 kw	210,000 kw	210,000 kw	420,000 kw	0 kw
Puget	330,000 kw	175,000 kw	175,000 kw	680,000 kw	0 kw
PGE		140,000 kw	140,000 kw	280,000 kw	0 kw
Pacific		70,000 kw	70,000 kw	140,000 kw	0 kw
WWP		105,000 kw	105,000 kw	210,000 kw	0 kw
Total	660,000 kw	700,000 kw	700,000 kw	1,730,000 kw	0 kw
Bonneville				185,000 kw[10]	0 kw
				1,915,000 kw	

[10] BPA expressly agreed to forebear exercising its 185,000 kilowatt reservation on an east to west basis until the 500 kv transmission line system was completed from Garrison to Taft. (Pl. Ex. 7).

The foregoing transmission demands are specifically complementary to the percentage of Colstrip generation which each Colstrip owner owns.

Colstrip Owner	Amount of Generation (Colstrip Units 1, 2, 3 and 4)
Montana	720
Puget	650
PGE	280
Pacific	140
WWP	210
Total	2,000 mw

(Def. Exs. 63-67)

All of the commercial power flow across the Intertie has been in favor of the Colstrip owners. Mr. Ross of BPA testified that prior to the completion of the Garrison to Taft 500 kv system there was no non-firm transmission across the Intertie. (Ross Tr. Pg. 385).[11]

The interests of the Colstrip owners are so substantial, that their interests are akin to a leasehold interest. (Hammerquist Depo. Pgs. 82-83). The Colstrip owners are required to pay for the use of the Intertie, pursuant to the Intertie charge, even if no Colstrip power is flowing across the 500 kv system. In the event that the Colstrip owners elect to build their own 500 kv system, BPA may charge them for the unamortized cost of the Intertie. (Pl. Ex. 7, Cl. 11).

All of the engineering expert testimony supports the conclusion that the Colstrip owners use the Montana Intertie. Professor G. Thomas Heydt testified on behalf of the Respondents as an expert witness.[12] He testified that the Colstrip

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[11] The Colstrip owners' assertion in their Petition at footnote 13 is patently false. The only power flow has been from Colstrip to the West. (Brush Tr. Pgs. 265-266).

[12] Professor Heydt is a Professor of Electrical Engineering at Purdue University. He specializes in power transmission systems.

owners use the 500 kv system from Townsend to Garrison to transmit their Colstrip power. He also testified that they control the flow of power across the 500 kv system by adjusting the steam generation at the Colstrip plants. Mr. Brush testified that most of the Colstrip power flows across the 500 kv system. He had that knowledge as a result of power flow studies which he had conducted. (Brush Tr. Pg. 268). Without the use of the Montana Intertie, Colstrip Units 3 and 4 could not be operated at their rated capacities. (Brush Tr. Pg. 240).

Colstrip Unit 3 could not be energized and operated until the Montana Intertie was completed to Garrison. Mr. Gregg of the Montana Power Company confirmed that fact.

> This letter is in response to the Administration's request for a current status report of the need for the Townsend-Garrison 500-kV transmission line and substation facilities. . . .
>
> If the 500-kV lines from Colstrip to Townsend to Garrison and the Garrison Substation are not completed by the fall of 1983 as presently scheduled, it would not be feasible to place Colstrip Unit No. 3 in commercial operation. However, with the interconnection of the proposed 500-kV lines at Garrison, substantially all of the plant capacity for Colstrip Unit No. 3 can be utilized. (Def. Ex. 45).

B. The Proceedings in State District Court.

During 1984, the Department notified the Colstrip owners that beneficial use taxes were being imposed for their use of the Montana Intertie pursuant to Mont. Code Ann. § 15-24-1203 (1983).[13] The Colstrip owners filed suit in the First Judicial District Court in Helena, Montana. After a four day trial, the District Court sustained the imposition of beneficial use taxes upon them. During trial, the Colstrip owners did not produce any power sales contracts between BPA and Montana cooperative customers, nor did they call any witness

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[13] The beneficial use tax statute, Mont. Code Ann. § 15-24-1203, was amended by Chapter 683 of the Laws of Montana 1983.

from a Montana cooperative who was knowledgeable about its operations and its relationship to the 500 kv system in Montana.

C. The Montana Supreme Court Decision.

The Colstrip owners' constitutional challenge to beneficial use taxation was rejected by the Montana Supreme Court on April 17, 1989. Their petition for re-hearing was denied on June 1, 1989.[14]

REASONS WHY THE WRIT SHOULD BE DENIED

The Colstrip owners, as the beneficial users of the Montana Intertie, should pay their fair share of state taxation.

> . . . the Court consistently has indicated that 'interstate commerce may be made to pay its way,' and has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology.

Complete Auto Transit v. Brady, 430 U.S. 274, 281 (1977).

The Montana beneficial use tax statute fulfills each of the criterion set forth in *Brady*. There is no discrimination against interstate commerce. Montana beneficial use taxes are imposed upon the Montana Power Company and Pacific, the intrastate users of the Intertie, in precisely the same fashion that taxes are imposed upon out-of-state utilities. The tax is predicated upon the amount of reserved capacity in the Montana Intertie in favor of each Colstrip owner. The tax is not dependent upon " . . . any distinction between in-state and out-of-state consumers." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981).

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[14] The Colstrip owners asserted in their petition for a re-hearing that the Montana Court had improperly concluded that they were responsible for fully amortizing the cost of the Montana Intertie. *Pacific*, at 773 P.2d 1181. The Colstrip owners admitted that their argument on this point was erroneous by letter to the Montana Court dated June 1, 1989. The Colstrip owners continuously misconstrued their own contractual relationship with BPA for 4½ years. (Whittinghill Tr. Pg. 1081).

The purpose of the tax is not in doubt. 500 kv systems owned by private parties in Montana are subject to taxation. Mont. Code Ann. § 15-23-101 (1983). Before the amendment to Mont. Code Ann. § 15-24-1203, beneficial users of the Montana Intertie, such as the Colstrip owners, would have escaped all state taxation. The Montana Supreme Court deemed such a result to be a "tax windfall." *Pacific*, at 773 P.2d 1183. The Montana beneficial use tax statute is an equivalency statute, which is applicable in those instances where Federal property is used for private commercial purposes. *United States v. Boyd*, 378 U.S. 39 (1964).

The Colstrip owners may not escape beneficial use taxation under the auspices of the Supremacy Clause. Congress did not intend for impact aid payments, pursuant to 16 U.S.C. § 839e(m), to be substitutes for state taxation. BPA did not implement the provisions of the law in a manner which was intended to be in lieu of state taxation. The Colstrip owners have contractually assumed all impact aid payments pursuant to the terms of the Montana Intertie Agreement.

15 U.S.C. § 391 is, by its very language, inapplicable to Montana beneficial use taxation. There is no discrimination against out-of-state consumers or producers of electricity. The taxes imposed on intrastate users of the Intertie and interstate users of the Intertie are predicated upon the reserved transmission demands under the Montana Intertie Agreement. Federal law is not in conflict with state law. *Hillsborough County v. Automated Medical Laboratories Inc.*, 471 U.S. 707 (1985).

The Colstrip owners do not "actually 'stand in the Government's shoes.' " *United States v. New Mexico*, 455 U.S. 720, 736 (1982). The legal and economic incidents of the beneficial use taxes do not fall upon the United States. *United States v. County of Fresno*, 429 U.S. 452 (1977). BPA has a completely neutral attitude about the imposition of beneficial use taxes upon the Colstrip owners.[15] Neither BPA nor the

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[15] Mr. Eskridge, BPA Montana District Manager, testified that Bonneville is neutral about the imposition of beneficial use taxes. (Eskridge Tr. Pg. 577).

United States have intervened in the litigation, although the litigation was well known to the United States for a period of 5 years. Beneficial use taxation of private users of Federal property "returns to the original intent of *M'Culloch v. Maryland.*" *United States v. County of Fresno*, 429 U.S. 452, 463 (1977).

The nexus between transmission of 1,915 megawatts of Colstrip power 92 miles across the Montana Intertie on a continuous basis, and the State of Montana, is substantial. *Miller Bros. v. Maryland*, 347 U.S. 340 (1954). The Due Process clause is fully satisfied. The Montana Legislature drew a rational distinction between users of 500 kv transmission line systems and cooperative customers of BPA. Such legislative tax classifications are constitutionally sound. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

> The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable.

Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, ___ U.S. ___, 109 S.Ct. 633, 638 (1988).

A. The Commerce Clause: The imposition of Montana's beneficial use tax upon the Colstrip owners for their use of the Montana Intertie does not discriminate against interstate commerce.

The Colstrip owners raise an argument which is remarkably similar to the argument which this Court rejected in *Commonwealth Edison Co. v. Montana*, supra.

> Instead, the gravamen of appellants' claim is that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers. Appellants do not suggest that this assertion is based on any of this Court's prior discriminatory tax cases.

Id., 453 U.S. 609, 618.

Montana's beneficial use tax statute is applied in an even-handed fashion. Montana Power Company has reserved 24% of the east to west capacity in the Montana Intertie. Its beneficial use taxes are predicated upon that 24% reserved capacity. Montana consumers and rate payers will accordingly assume 24% of the beneficial use taxes through the years. Similarly, Pacific has a portion of its service territory in Montana. It reserved 7% of the east to west capacity in the Intertie, and accordingly will pay 7% of the beneficial use taxes as a result of its use. Those taxes presumably will be passed on to its Montana consumers and customers.[16] Just as in *Commonwealth Edison*, the amount of tax is directly dependent upon the specific interest which is being taxed. In that case, the severance tax was based upon the amount of coal taken. In this case, the tax is based upon a user's reserved capacity in the 500 kv system.

The Colstrip owners' contentions regarding exportation of beneficial use taxes to out-of-state citizens, is without foundation. Investor-owned utilities routinely pass on the cost of taxes to their consumers, through ratemaking procedures. *Appalachian Power Co. v. Federal Power Commission*, 382 F.2d 237 (4th Cir. 1964), cert. denied 379 U.S. 829 (1964). Thus, it is of no moment that Puget passes on all of its Montana ad valorem taxes to its Washington ratepayers and customers. Mont. Code Ann. § 15-23-101 (1983). If investor-owned utilities could avoid state taxation by merely asserting that a disproportionate amount of the taxes would ultimately be passed on to out-of-state consumers, state tax systems would be irretrievably frustrated.

The sponsor of the amendment to Mont. Code Ann. § 15-24-1203 recognized the practical effect of imposing beneficial use taxes upon users of 500 kv lines.[17]

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[16] Pacific's Report to the Federal Energy Regulatory Commission reflects that a portion of its service territory is in Montana. (Def. Ex. 73).

[17] "Representative Marks said he cannot see where the rate payers will be assessed an additional charge any more than they would have, had

(Continued on following page)

The selection of the use of 500 kv transmission line systems for beneficial use taxation is related to a rational purpose. 500 kv systems, which are owned by investor owned utilities, are subject to ad valorem property taxation in Montana. Mont. Code Ann. § 15-23-101 (1983). (Resp. App. 2). The Colstrip owners pay ad valorem property taxes for the 500 kv system which they own in Montana. But for the amendment to Mont. Code Ann. § 15-24-1203, MCA, during 1983, they would not have paid any taxes despite the reservation of the Montana Intertie for their benefit. In order to close this "tax loop hole", the Montana Legislature enacted the amendment to the statute.[18] This tax equivalency purpose is constitutionally rooted. *D.H. Holmes Co. v. McNamara*, ___ U.S. ___, 108 S.Ct. 1619 (1988).

Despite the Colstrip owners abject failure to prove that the cooperative customers of BPA in Montana are similarly situated, they persist with that argument. They failed to prove that the cooperative customers of BPA use the Montana Intertie.

> In regard to Owners' claims regarding the REAs, we note they do not use the Montana Intertie line, nor possess firm transmission demands in 500 KV lines which may be taxed in 1984, under § 15-24-1203, MCA.

Pacific, at 773 P.2d 1188.

(Continued from previous page)

that line been built by a private partnership. If it had been built by a private partnership, as was originally planned, the property tax would have been in place and the rate payers would have ultimately picked up that charge." (Minutes of the House Taxation Committee, Pg. 4, March 1, 1983).

[18] Representative Marks stated the purpose of the amendment.

> House Bill 747 would impose the privilege tax. It is unfair for government owned power companies to come in and compete with privately owned power companies. If the power line would have been privately owned, the counties would have received taxes off that line. (Minutes of the House Taxation Committee, Pg. 1, March 1, 1983).

Certiorari does not lie to review factual issues which have been determined by the Court below. *Southern Power Co. v. North Carolina Public Service Commission*, 263 U.S. 508 (1924).

The Montana Legislature properly recognized that cooperative customers of BPA are vastly different than investor owned utilities. Cooperatives, by law, must provide federal power to their customers without a profit making animus. 16 U.S.C. § 832b. (Resp. App. 8). Montana cooperative customers of BPA purchase federal power at a priority firm rate. 16 U.S.C. § 832c. (Resp. App. 9). *Pacific*, at 773 P.2d 1187. Their priority rights are guaranteed by federal law.[19] The Colstrip owners generate and transmit vast amounts of Colstrip power across Montana for retail sale at a profit. They are bulk power transferrers of large amounts of privately owned power. (Ross Tr. Pg. 368). Cooperatives do not utilize the Montana Intertie. They are served through wheeling agreements with an investor owned utility such as MPC. *Ottertail Power Co. v. United States*, 410 U.S. 366 (1973).[20] Congress has separately classified cooperatives in the 1980 Regional Act. 16 U.S.C. § 839c(e). (Resp. App. 12). The Montana Intertie is a specifically segmented portion of the Federal Columbia River Transmission System. Its costs are specifically recovered from the users – the Colstrip owners.[21] Cooperative customers were not charged for the use of the Intertie. Cooperative customers did not pay to amortize the cost of the Montana Intertie. BPA built the Montana Intertie specifically

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[19] 16 U.S.C. § 839c(a); 16 U.S.C. § 839g(c) (Resp. App. 11 and 13).

[20] MPC admitted in answers to Interrogatories that it provides wheeling services over its transmission lines for BPA's cooperative customers. (Answer to Interrogatory 128).

[21] BPA's transmission rate design studies reflect that the cost of the Montana Intertie is recovered exclusively from the Colstrip owners. (Def. Ex. 43). See also Pl. Ex. 7, Pg. 3.

for the benefit of the Colstrip owners.[22] The record is absolutely devoid of any proof to establish that cooperatives have reserved any firm transmission capacity in the Montana Intertie for an extended period of time. The Colstrip owners have done precisely that. (Pl. Ex. 7). The Montana Supreme Court's conclusion that cooperatives do not use the Montana Intertie is irrefutable.[23]

Montana's tax classification system is beyond constitutional reproach.

> Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959).

The foregoing discussion reflects the distinctive nature between investor owned utilities and Montana cooperative customers of BPA.[24] The Montana Supreme Court has long sustained property tax classifications which are based upon a difference in productivity, utility, and economic setting in society. *Department of Revenue v. Montana Stockgrowers Ass'n.*, 777 P.2d 285 (1989). The tax classification statute at issue in that case, is a portion of the same tax classification system of which the Colstrip owners complain.

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[22] Mr. Eskridge testified that the Montana Intertie was not built at the request of cooperative customers. (Eskridge Tr. Pg. 555). He also testified that the cooperative customers could be adequately served before the development of the 500 kv system. (Eskridge Tr. Pg. 555-556).

[23] The Department explicitly stated in its Brief to the Montana Supreme Court "The preference customers of Bonneville Power Administration do not use the Montana Intertie." (Brief to the Supreme Court, Pg. 31, November 10, 1988).

[24] Mont. Code Ann. § 15-6-135 (1987) imposes a tax rate of 3% of market value for cooperative property. It also affords the same tax rate for "new industrial" property. Three of the Colstrip owners enjoyed this preferential tax classification as a result of their development of the Colstrip generating units. *Department of Revenue v. Puget Sound Power & Light Co.*, 587 P.2d 1282 (1978).

The Colstrip owners' discrimination argument collapses under its own weight. They admit that shorter transmission lines and local distribution lines are used for distribution, rather than for bulk power transfers. (Petition Pg. 6). This clear difference in use constitutes a sufficient basis for tax classification under any system. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, supra.[25]

Constitutional adjudication should not be predicated upon expectancies. The Colstrip owners' argument concerning the amendment to Mont. Code Ann. § 15-6-141(1)(a) during 1981 is premature. Congress has not enacted legislation allowing Montana to tax the property owned by an agency to transmit or distribute electrical energy.[26]

The Colstrip owners continuously misstate the record and the issue before the Montana Supreme Court. The Respondents conclusively established that they had applied the beneficial use tax statute to users of state tax exempt property. *Pacific*, at 773 P.2d 1184. The beneficial use taxation of those entities was predicated upon Mont. Code Ann. § 15-24-1203 (1983). That is precisely the same statute upon which beneficial use taxation of the Colstrip owners is predicated. There was no discrimination against those who use federal property, in favor of those who use state property. The decision in *United States v. City of Manassas*, 830 F.2d 530 (4th Cir. 1987) aff'd, 108 S.Ct. 1568 (1988), is not applicable.[27]

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[25] The Colstrip owners' argument is essentially moot. The question before the Montana Supreme Court was not whether the Legislature could separately classify the property of Montana cooperatives (Mont. Code Ann. § 15-6-135 (1983), and the property of investor owned utilities for ad valorem tax purposes. (Mont. Code Ann. § 15-6-141 (1983). The Montana Court was not called upon to decide that issue. The Colstrip owners may not raise it to justify a writ of certiorari. *Walters v. City of St. Louis*, 347 U.S. 231 (1954).

[26] Chapter 478, Laws of Montana 1981.

[27] The Montana Supreme Court held that Mont. Code Ann. § 15-24-1203 (1987), had not been applied in the case, that it had not been considered by the District Court, and that it was inapplicable for purposes of the litigation. *Pacific*, at 773 P.2d 1184. Mont. Code Ann. § 1-2-201 (1983). (Resp. App. 3).

The Colstrip owners argument concerning *Brady's* fair apportionment test is without merit. First, impact aid payments are not a substitute for taxation.[28] BPA, represented to Montana citizens that impact aid would be available in the counties where the 500 kv system was being constructed. It carefully avoided any representation that impact aid would be substituted for state taxation.[29] Second, the Colstrip owners recognized that impact aid payments would not be a substitute for taxation. When they entered into the Montana Intertie Agreement on April 17, 1981, they contractually agreed to reimburse BPA, via the Intertie charge, for any impact aid payments. Third, the Colstrip owners misapprehend the purpose of the fair relationship test set forth in *Brady*.

> Rather, the test is closely connected to the first prong of the Complete Auto Transit test. Under this threshold test, the interstate business must have a substantial nexus with the State before any tax may be levied on it. . . .since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden'.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625-626.

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[28] Mr. Eskridge, BPA's Montana District Manager, was deposed and his deposition was introduced into evidence. It reflects that BPA never intended that its implementation of its impact aid policy would be substituted for state taxation. (Eskridge Depo. Pgs. 14-15).

[29] "Federal law currently prohibits BPA from making in-lieu tax payments. However, the BPA administrator, under provisions of the Pacific Northwest Electric Power Planning and Conservation Act, may make impact aid payments to local governments to compensate for increased services required because of the transmission project." Final Environmental Impact Statement – Garrison-Spokane 500-kV Transmission Project, March 1983. (Def. Ex. 36, Vol. II, Pg. II-27).

"As a Federal agency, BPA pays no taxes to State or local governments. Congress could authorize in-lieu-of-tax payments, but has not done so. There is a provision in the Regional Act for 'impact aid payments' based on services provided the Administration. These are not in-lieu-of-tax payments but payments for impact on local government services." Id. at Pg. II-89.

The nexus between the use of the Montana Intertie and the State of Montana cannot be doubted. The transmission of vast amounts of Colstrip power over the Intertie is for one purpose only. That purpose is the sale of Colstrip power to the Colstrip owners customers.[30] This commercial enterprise is "an activity or presence" which subjects the Colstrip owners to the taxing power of Montana. *D.H. Holmes Co. v. McNamara*, supra.

The Colstrip owners erroneously assert that impact aid payments are an adequate substitute for beneficial use taxation. The facts reveal otherwise.[31] The 1984 beneficial use taxes, for the use of the Montana Intertie, amount to $1.6 million. The imposition of these beneficial use taxes ensures that interstate commerce will not be placed "in a privileged position." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623.[32]

B. The Supremacy Clause: Montana's beneficial use taxes are not preempted by the impact aid provisions of the 1980 Regional Act, nor are they preempted by 15 U.S.C. § 391. The doctrine of implied preemption is inapplicable.

One who institutes a preemption challenge to a state law, carries a very heavy burden of proof.[33] The Colstrip owners

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[30] The vast commercial enterprise of the generation, transmission and sale of Colstrip power is clearly reflected in the annual reports which the Colstrip owners submit to the Federal Energy Regulatory Commission. (Def. Ex. 68-82).

[31] Mr. Eskridge testified that BPA had made limited one time construction impact aid payments to three Montana counties, where the Montana Intertie is situated, in the amount of $156,055. (Eskridge Tr. Pg. 548).

[32] The Montana Intertie, which was constructed expressly for the benefit of the Colstrip owners, cost approximately $92 million. The benefit of the Montana Intertie will enure to the Colstrip owners for at least 23 years. (Pl. Ex. 7). This "significant economic presence" subjects the Colstrip owners to fairly imposed Montana taxes. *D.H. Holmes Co. v. McNamara*, 108 S.Ct. 1619, 1624.

[33] See Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 Constitutional Commentary 311 (1988).

have consistently failed to prove that Congress intended to preempt Montana beneficial use taxation when it enacted 16 U.S.C. § 839e(m) and when it enacted 15 U.S.C. § 391.

The doctrine of implied preemption is inapplicable under the modern rule stated in *County of Fresno*. Beneficial use taxes fall upon the private users of the Montana Intertie. Neither the economic nor the legal incidence of the tax is passed on to the United States.

1. Impact aid was never intended to preempt beneficial use taxation. 15 U.S.C. § 391 is not applicable to Montana beneficial use taxation.

Congress clearly expressed its purpose in enacting the 1980 Regional Act.[34] The text of the Act makes it clear that Congress did not intend to preempt any form of state taxation.

a. The Impact Aid provisions of the 1980 Regional Act.

16 U.S.C. § 839e(m) is clear on its face. It was not designed to be, it has not been administered as, and it does not serve as a substitute for taxation. In the words of BPA:

> B. Payment of Service Costs. BPA has determined that the 'costs' which can be paid through impact aid can only be service costs, and not any other costs or reimbursement of lost taxes. . . . Any uncertainty on this or the tax issue is put to rest by the legislative history. Representative Dingell, in his summary of section 7(m)(126 Cong. Rec. 10685 (daily ed. Nov. 17, 1980)) stated:
>
> > The intent is to make these payments reflect the services provided by the governments and not any taxes that may have been lost or estimated to have been lost by the communities. This is not a payment-in-lieu-of-taxes provision. (48 Fed.Reg. 55765).

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[34] 16 U.S.C. § 839 sets forth the Congressional declaration of purpose. (Resp. App. 14).

It is clear that Congress will provide for payments in lieu of taxation, when it deems it appropriate to do so.[35] Congress will specifically preempt state taxation when it intends to do so. It did so when it enacted section 9b of the Atomic Energy Act of 1946. *Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952).

BPA represented to Montanans that impact aid was not designed to be a substitute for state taxation. Mr. Eskridge stated that impact aid was not a substitute for, or in-lieu-of, state taxation. (Eskridge Tr. Pgs. 532-533, 538-539 and 551)[36]. BPA made it clear, in its Environmental Impact Statement, that impact aid was not a substitute for taxation.[37]

The Colstrip owners recitation of the chronology of events leading to impact aid payments is erroneous. The Regional Act was enacted on December 5, 1980. On April 17, 1981, the Colstrip owners entered into the Montana Intertie Agreement with BPA. (Pl. Ex. 7). They expressly assumed the obligation for all impact aid payments which BPA might subsequently make.[38] The Colstrip owners assertion that

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[35] Congress deemed it appropriate to provide for "payments in lieu of taxes" when it enacted the Atomic Energy Act of 1954. 42 U.S.C. § 2208 (Resp. App. 17).

[36] Mr. Eskridge testified that impact aid payments were not in-lieu-of state taxation during his deposition. (Eskridge Depo. Pg. 14).

[37] "9. Comment: BPA should make payments in-lieu-of-taxes, even if it requires an act of Congress to make these payments legal.

Response: Congress has not given BPA the authority to make payments in-lieu-of-taxes. We cannot make such payments until Congress authorizes them." (Def. Ex. 36, Vol. II, Pg. II-91).

[38] "Total Annual Costs of facilities associated with the Townsend-Garrison 500 kV transmission line including terminals, and, prior to extension of the 500 kV portion of the Federal Transmission System to Garrison, the 500/230 kV transformer at Garrison. Such annual costs are the total of . . . (4) payments made pursuant to section 7(m) of Public Law 96-501 with respect to these facilities." (Pl. Ex. 7, Section E, Pg. 3).

impact aid payments account for *all* economic impacts associated with construction of the 500 kv system is simply erroneous. BPA stated in its notice to adopt its impact aid policy that "[t]he intent is to pay for a qualifying local government's cost of services . . . Services covered are all those reasonably related to the facility . . . and include . . . school services, etc." 48 Fed.Reg. 55764. However, in implementing the Act, Bonneville did not include the cost of providing school services as an element of the impact aid formula. (Eskridge Tr. Pg. 521).

The Colstrip owners misapprehend the purpose of impact aid and the purpose of taxation. "A tax is not an assessment of benefits." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937). Impact aid payments were made to three Montana counties, as a result of the presence of a transitory construction work force. (Eskridge Depo. Pgs. 33-34). The two concepts are mutually exclusive.

> In cases such as this, it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 634.

b. 15 U.S.C. § 391 is not applicable.

This Court has held that preemption analysis begins with a presumption that Congress does not intend to displace state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). 15 U.S.C. § 391 is inapplicable for several reasons. First, Congress clearly targeted the law at the New Mexico electrical energy tax. *Arizona Public Service Commission v. Snead*, 441 U.S. 141 (1979). Second, the Montana tax statute contains no discriminatory credits. It applies equally to interstate users of the Montana Intertie and to intrastate users of the Intertie.[39] Third, the Colstrip owners have not proven any discrimination

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[39] *Pacific*, at 773 P.2d 1185.

which would be barred by the statute.[40] The Colstrip owners' Supremacy Clause assertions regarding the statute ultimately collapse into their Commerce Clause argument.

BPA's Environmental Impact Statement makes it clear that the use of the Montana Intertie will benefit both intrastate and interstate Colstrip owners.[41] The Colstrip owners' citation to *State v. Burbank*, 691 P.2d 845 (1984), is particularly perplexing. The Colstrip owners have consistently urged that the Department should impose beneficial use taxes upon the generation from federal hydroelectric plants.[42]

2. Beneficial use taxation of the use of the Montana Intertie is fully justified by this Court's Supremacy Clause cases.

The Colstrip owners lack the fundamental standing to raise an implied preemption argument. They do not "actually

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[40] Pursuant to its Garrison West Agreement with BPA, MPC transmits its Colstrip power only to the Garrison Substation. (Pl. Ex. 8). MPC is fully taxed for its use of the Montana Intertie between Townsend and Garrison. Montana consumers and ratepayers will absorb at least 24% of all beneficial use taxes which are levied upon the use of the Montana Intertie.

[41] "When Units 3 and 4 are completed, the generating capacity will be about 2,100 MW; 860 MW, by contract, will directly serve the needs of Montana residents, while the remaining contracted 1,240 MW will be transmitted to the utility participants to serve customers throughout the Northwest. One-half (65 MW) of Pacific Power and Light's share will be additionally delivered within Montana at Libby and Flathead. Successful integration into Bonneville's system will require reinforcement of part of the Federal system and extension of the main 500-kV electrical grid to the vicinity of Garrison, Montana. Without adding 500-kV transmission facilities to BPA's power grid, the existing transmission system would not be viable for transmitting the output of Unit 4, and would not form a reliable intertie to transmit the scheduled 1,240 MW of energy to Northwest users." (Def. Ex. 36, Vol. I, Pgs. I-10 and I-11).

[42] The Amended Complaint alleges discrimination, since the Department had not imposed beneficial use taxes as a result of power generated at federal hydroelectric dams. (Complaint, Count II, para. 26). This allegation flies in the face of their assertion that 15 U.S.C. § 391 bars a tax upon power generated at the Hoover Dam.

'stand in the Government's shoes.' " *United States v. New Mexico*, supra. They are not instrumentalities of the United States, with respect to the use of the Montana Intertie. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Nor are they agents acting on behalf of the United States. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). The transmission of 1,915 megawatts of Colstrip power on a continuous basis by the Colstrip owners cannot impede or impair the operations of the Government.[43]

Modern Supremacy Clause jurisprudence is predicated upon *County of Fresno*.

> . . . and M'Culloch foresaw the unfairness in forcing a State to exempt private individuals with beneficial interests in federal property from taxes imposed on similar interests held by others in private property.

Id. at 429 U.S. 463.

This Court has clearly stated the foundational predicates for beneficial use taxation.

> Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. . . .His personal advantages from the relationship by way of salary, profit, *or beneficial personal use of the property may be taxed* as we have held.

United States v. County of Allegheny, 322 U.S. 174, 187-188 (1944).

The most modern expression of this rule is found in *County of Fresno*, supra.

> These cases make clear that a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and

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[43] BPA deferred its interest in the Intertie in favor of the Colstrip owners. Its 185 megawatt reservation was not exercised, in order that the Colstrip owners would have the full use of the east to west capacity, until the Garrison to Taft 500 kv system was completed. (Pl. Exs. 7 and 11).

> so long as it is the possession *or use by the private citizen that is being taxed.*

Id. at 429 U.S. 462.

The Montana beneficial use tax statute squares precisely with these rules.

> The tax shall be imposed upon the possession *or other beneficial use* of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. (Mont. Code Ann. § 15-24-1203 (1983)).

The Court has recognized that "[t]he privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582.[44] The Court has accordingly sustained use taxes upon a private corporation which leased a federal industrial plant in Michigan. *United States v. City of Detroit*, 355 U.S. 466 (1958). A private enterprise, acting as a permittee, was subject to the Michigan beneficial use tax statute in *United States v. Township of Muskegon*, 355 U.S. 484 (1958).

> The vital thing under the Michigan statute, and we think permissibly so, is that Continental was using the property in connection with its own commercial activities.

Id. at 355 U.S. 486.

The Michigan personal property tax statute was successfully imposed upon a private contractor doing work on behalf of the United States in *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958).

> The use by the contractor for his own private ends – in connection with commercial activities carried on for profit – is a separate and distinct taxable activity.

United States v. Boyd, 378 U.S. 39, 44.[45]

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[44] The Montana Intertie Agreement provides for "Payment for Use of Montana Intertie." (Pl. Ex. 7, Pg. 10).

[45] The Montana Supreme Court relied heavily on this Court's decision in *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906). *Pacific*, at 773 P.2d 1180.

The right of the Colstrip owners to use the Montana Intertie cannot be doubted. Its substantial interests are set forth in an earlier portion of this Brief. Its rights are far more substantial than the contractual rights, which formed the predicate for taxation in *International Paper Co. v. County of Siskiyou*, 515 F.2d 285 (9th Cir. 1974). Taxation is frequently based upon interests which are less than fully possessory in nature. *Portland General Electric Co. v. State Tax Commission*, 437 P.2d 827 (1968).

The beneficial use taxes upon the Colstrip owners, easily satisfy the test set forth in *County of Fresno*, supra. First, neither the legal nor the economic incidence of the taxes fall upon the United States. The Colstrip owners pay the taxes and they will never be passed on to the United States.[46] Second, the tax is nondiscriminatory for all of the reasons set forth in this Brief. Third, the value of the Colstrip owners' use interest in the lines has been carefully segregated by the Respondents. Pursuant to *United States v. County of Allegheny*, supra, only the interests of the Colstrip owners are subject to taxation.[47]

The Montana beneficial use tax statute is clearly distinguishable from the Tennessee tax statute which was set aside in *United States v. Hawkins County, Tennessee*, 859 F.2d 20 (6th Cir. 1988), cert. denied, 109 S.Ct. 1638 (1989). In *Hawkins County*, the 6th Circuit held that a private contractor,

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[46] The reference to Mr. Hammerquist's testimony is disingenuous. Mr. Hammerquist was an electrical engineer called to testify about a matter of which he had no knowledge. (Hammerquist Tr. Pgs. 454 and 460).

[47] The taxes are predicated upon the cost of the transmission line system ($92,000,000) times the allocated transmission capacities in favor of each Colstrip owner. Thus, for Montana Power Company the tax is predicated upon $92,000,000 times 420,000 kw over 1,730,000 kw. Collectively, $36,000,000 of the cost was utilized as a measure of the beneficial use interests in favor of the Colstrip owners. *United States v. City of Detroit*, supra.

operating under a cost plus contract with the United States "has a beneficial use of the government-owned property." Id. at 859 F.2d 23. The Tennessee statute did not describe a specific beneficial use, which was allocated solely to the private use of the government owned property. The Tennessee statute imposed a general ad valorem property tax on an interest in real property.[48] The Montana Supreme Court held that only the use interest of the Colstrip owners was being recognized for beneficial use taxation purposes.

> The DOR thus based its assessment on the average of the initial agreement's project value and estimates of the actual cost of constructing these lines. The resulting value for the Montana Intertie line was established at $92,000,000. The DOR then factored this value into the cost portion of the standard unitary method and assessed taxes to each owner based upon their firm transmission demands under the Montana Intertie Agreement.

Pacific, at 773 P.2d 1179.[49]

The Montana beneficial use tax statute recognizes an interest in federal property which is far more substantial than that which was sustained in *County of Fresno*, supra.

> There the property was being used by business for 'profit' and here the property is being put to 'beneficial personal use'. Under the rule of *United States v. Allegheny County* and *United States v. City of Detroit*, this difference is inconsequential. The two types of interests are equally taxable.

Id. at 429 U.S. 467.

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[48] Montana's general ad valorem real property tax statute is Mont. Code Ann. § 15-6-134 (1983). (Resp. App. 4).

[49] The Montana Supreme Court explicitly recognized that the Department had the right to base the taxes upon the full value of the transmission line system, because BPA had not exercised its right to use any portion of the capacity of the line for federal purposes. *Pacific*, at 773 P.2d 1182.

C. The Fourteenth Amendment: Montana's beneficial use tax statute is fully consistent with the guarantees of the Equal Protection and the Due Process clauses.

The Due Process clause imposes a requirement that a tax have a nexus with the state which is imposing it. *Miller Brothers Co. v. Maryland*, supra. Colstrip power is generated in Rosebud County, Montana. It is transmitted 430 miles across Montana, through the vehicle of the 500 kv system.[50] The taxes fairly reflect the Colstrip owners' activities in Montana. *Norfolk & Western Railway Co. v. Missouri State Tax Commission*, 390 U.S. 317 (1968). The right to transmit 1,915 megawatts of Colstrip power across the Montana Intertie is coextensive with the life of the Colstrip plants in Rosebud County, Montana. The tax is based exclusively upon the amount of transmission capacity which the Colstrip owners reserved in the Montana Intertie. It would be a rare circumstance to set aside the Montana beneficial use tax under these circumstances. *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934).

The Montana Legislature has the authority to select the use of 500 kv transmission line systems as the object of beneficial use taxation. *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356 (1973). The tax was enacted to ensure that users of 500 kv systems would not escape taxation. That reasonable and rational purpose is sufficient to ground the tax constitutionally. *Allied Stores of Ohio v. Bowers*, supra.

The Colstrip owners' equal protection argument is but another manifestation of their Commerce Clause discrimination argument. Under Montana law, the Colstrip owners had

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[50] BPA represented in its Environmental Impact Statement "The Garrison-Spokane 500-kV Transmission Project is a proposal to build 500,000-volt transmission line facilities across western Montana and northern Idaho to the Spokane area in order to reinforce a section of the Bonneville Power Administration's electric power grid and to permit reliable integration of 1,240 megawatts of power produced by Colstrip Units 3 and 4, for use in Montana and throughout the Northwest." (Def. Ex. 36, Vol. I, Pg. i).

an affirmative duty to prove that other entities were similarly situated, vis-a-vis the Montana Intertie.[51] The Colstrip owners abjectly failed to prove that there were any entities which are similarly situated with respect to the Montana Intertie. Montana cooperatives are BPA customers and purchasers of federal power. *Pacific*, at 773 P.2d 1187. The Colstrip owners are bulk power transferrers of massive amounts of Colstrip power across the Montana Intertie. Their equal protection claim fails upon this basis alone.

The Colstrip owners misrepresent the record. The Department established at trial that all entities, subject to taxation under Mont. Code Ann. § 15-24-1203 (1983), had been subjected to appropriate investigation.[52] The Colstrip owners are the exclusive users of the Montana Intertie, for purposes of 1984 beneficial use taxation. No other private entities enjoyed reserved transmission capacity in the lines. Until January 23, 1986, the Colstrip owners enjoyed the exclusive right to use 1,915 megawatts of east to west transmission capacity in the Montana Intertie.

According to Mont. Code Ann. § 15-24-1203 (1983), possession *or beneficial use* of 500 kv systems is an acceptable predicate for taxation. These equally justifiable bases for taxation were affirmed by this Court in *County of Fresno*, supra.

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[51] Mont. Code Ann. § 26-1-402 (1983) imposes a duty upon a plaintiff to establish its case by a preponderance of the evidence. (Resp. App. 7). Mont. Code Ann. § 26-1-401 (1983) establishes the burden of going forward with the evidence, in order to establish the case. (Resp. App. 6).

[52] Mr. Holliday testified that lessees of Forest Service land had exclusive use of the land, for which they were taxed. (Holliday Tr. Pgs. 829 and 839).

CONCLUSION

The writ of certiorari sought by the Colstrip owners should be denied.

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Supreme Court of the United States

October Term, 1989

PACIFIC POWER AND LIGHT COMPANY, et al.,

Petitioners,

v.

THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA, et al.,

Respondents.

APPENDIX TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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APPENDIX

TABLE OF CONTENTS

Page

Constitutional and Statutory Provisions

The Montana Beneficial Use Tax Statute – Mont. Code Ann. § 15-24-1203 (1983).....App. 1

Montana Ad Valorem Central Assessment Statute – Mont. Code Ann. § 15-23-101 (1983).....App. 2

Montana Statute for effective date of Legislation – Mont. Code Ann. § 1-2-201 (1983).....App. 3

Montana General Ad Valorem Real Property Tax Statute – Mont. Code Ann. § 15-6-134 (1983)....App. 4

Montana Burden of Proof Statute – Mont. Code Ann. § 26-1-401 (1983).....App. 6

Montana Burden of Persuasion Statute – Mont. Code Ann. § 26-1-402 (1983).....App. 7

Congressional Definition of Cooperatives – 16 U.S.C. § 832b.....App. 8

Bonneville Power Act – Preference for Cooperative Customers – 16 U.S.C. § 832c.....App. 9

Pacific Northwest Electric Power Planning and Conservation Act of 1980 – Priority for Preference Customers – 16 U.S.C. § 839c(a).....App. 11

Pacific Northwest Electric Power Planning and Conservation Act of 1980 – Classification of Cooperative Customers – 16 U.S.C. § 839c(e).....App. 12

Pacific Northwest Electric Power Planning and Conservation Act of 1980 – Continued Preference for Cooperative Customers – 16 U.S.C. § 839g(c).....App. 13

Pacific Northwest Electric Power Planning and Conservation Act of 1980 – Congressional Declaration of Purpose – 16 U.S.C. § 839.....App. 14

Atomic Energy Act of 1954 – Payments in Lieu of Taxes – 42 U.S.C. § 2208.....App. 17

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Montana Beneficial Use Tax Statute - Mont. Code Ann. § 15-24-1203 (1983).

> **15-24-1203. Privilege tax on gainful use of tax-exempt property – exceptions.** After March 17, 1969, there is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax may be imposed upon the possession or other beneficial use of buildings owned by public entities and located upon public airports. However, privately owned buildings located on such airport property are subject to tax. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber, or grazing leases or permits issued by the United States or the state of Montana or upon any easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax.

Montana Ad Valorem Central Assessment Statute - Mont. Code Ann. § 15-23-101 (1983)

15-23-101. (Effective as provided in Compiler's Comment)

Properties centrally assessed. The department of revenue shall centrally assess each year:

(1) the franchise, roadway, roadbeds, rails, rolling stock, and all other operating property of railroads operating in more than one county in the state or more than one state;

(2) property owned by a corporation or other person operating a single and continuous property operated in more than one county or more than one state, including telegraph, telephone, microwave, electric power or transmission lines; natural gas or oil pipelines; canals, ditches, flumes, or like properties and including property constructed, owned, or operated by a public agency created by the congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives);

(3) all property of scheduled airlines;

(4) the net proceeds of mines and of oil and gas wells;

(5) the gross proceeds of coal mines; and

(6) property described in subsections (1) and (2) which is subject to the provisions of Title 15, chapter 24, part 12. **(Subsection (6) applicable to taxable periods beginning after December 31, 1983.)**

Montana Statute for Effective Date of Legislation - Mont. Code Ann. § 1-2-201 (1983)

1-2-201. Statutes – effective date. (1) Every statute adopted after January 1, 1981, except those that provide for appropriation by the legislature of public funds for a public purpose, takes effect on the first day of October following its passage and approval unless a different time is prescribed therein. Every statute providing for appropriation as specified in this subsection takes effect on the first day of July following its passage and approval unless a different time is prescribed therein.

(2) "Passage", as used in subsection (1), means the enactment into law of a bill which has passed the legislature either with or without the approval of the governor, as provided in the constitution.

Montana General Ad Valorem Real Property Tax Statute - Mont. Code Ann. § 15-6-134 (1983)

15-6-134. Class four property – description – taxable percentage. (1) Class four property includes:

(a) all land except that specifically included in another class;

(b) all improvements except those specifically included in another class;

(c) the first $35,000 or less of the market value of any improvement on real property and appurtenant land not exceeding 5 acres owned or under contract for deed and actually occupied for at least 10 months a year as the primary residential dwelling of:

(i) a widow or widower 62 years of age or older who qualifies under the income limitations of (iii) of this subsection;

(ii) a widow or widower of any age with dependent children who qualifies under the income limitations of (iii) of this subsection; or

(iii) a recipient or recipients of retirement or disability benefits whose total income from all sources including otherwise tax-exempt income of all types is not more than $8,000 for a single person or $10,000 for a married couple;

(d) all golf courses, including land and improvements actually and necessarily used for that purpose, that:

(i) consist of at least 9 holes and not less than 3,000 lineal yards; and

(ii) were used as a golf course on January 1, 1979, and were owned by a nonprofit Montana corporation.

(2) Class four property is taxed as follows:

(a) Except as provided in 15-24-1402 or 15-24-1501, property described in subsections (1)(a) and (1)(b) is taxed at 8.55% of its market value.

(b) Property described in subsection (1)(c) is taxed at 8.55 of its market value multiplied by a percentage figure based on income and determined from the following table:

Income Single Person	Income Married Couple	Percentage Multiplier
$0 – $1,000	$0 – $ 1,000	0%
1,001 – 2,000	1,001 – 2,000	10%
2,001 – 2,800	2,001 – 3,000	20%
2,801 – 3,600	3,001 – 4,000	30%
3,601 – 4,400	4,001 – 5,000	40%
4,401 – 5,200	5,001 – 6,000	50%
5,201 – 6,000	6,001 – 7,000	60%
6,001 – 6,800	7,001 – 8,000	70%
6,801 – 7,600	8,001 – 9,000	80%
7,601 – 8,000	9,001 – 10,000	90%

(c) Property described in subsection (1)(d) is taxed at one-half the taxable percentage established in subsection (2)(a), or 4.275%.

Montana Burden of Proof Statute - Mont. Code Ann. § 26-1-401 (1983)

> **26-1-401. Who has the burden of producing evidence.** The initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence.

Montana Burden of Persuasion Statute - Mont. Code Ann. § 26-1-402 (1983)

> **26-1-402. Who has the burden of persuasion.** Except as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.

Congressional Definition of Cooperatives - 16 U.S.C. § 832b

> As employed in this Act, the term "public body", or "public bodies", means States, public power districts, counties, and municipalities, including agencies or subdivisions of any thereof. As employed in this Act, the term "cooperative", or "cooperatives", means any form of nonprofit-making organization or organizations of citizens supplying, or which may be created to supply, members with any kinds of goods, commodities, or services, as nearly as possible at cost.

Bonneville Power Act - Preference for Cooperative Customers - 16 U.S.C. § 832c

(a) **General provisions**. In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.

(b) **Prior to January 1, 1942; subsequent thereto.** To preserve and protect the preferential rights and priorities of public bodies and cooperatives as provided in section (a) and to effectuate the intent and purpose of this Act that at all times up to January 1, 1942, there shall be available for sale to public bodies and cooperatives not less than 50 per centum of the electric energy produced at the Bonneville project, it shall be the duty of the administrator in making contracts for the sale of such energy to so arrange such contracts as to make such 50 per centum of such energy available to said public bodies and cooperatives until January 1, 1942: Provided, That the electric energy so reserved for but not actually purchased by and delivered to such public bodies and cooperatives prior to January 1, 1942, may be disposed of temporarily so long as such temporary disposition will not interfere with the purchase by and delivery to such public bodies and cooperatives at any time prior to January 1, 1942: Provided further, That nothing herein contained shall be construed to limit or impair the preferential and priority rights of such public bodies or cooperatives after January 1, 1942; and in the event that after such date there shall be conflicting or competing applications for an allocation of electric energy

between any public body or cooperative on the one hand and a private agency of any character on the other, the application of such public body or cooperative shall be granted.

Pacific Northwest Electric Power Planning and Conservation Act of 1980 - Priority for Preference Customers - 16 U.S.C. § 839c(a)

> **(a) Preferences and priorities.** All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof. Such sales shall be at rates established pursuant to section 7.

Pacific Northwest Electric Power Planning and Conservation Act of 1980 - Classification of Cooperative Customers - 16 U.S.C. § 839c(e)

> **(e) Contractual entitlements to firm power.** (1) The contractual entitlement to firm power of any customer from whom, or on whose behalf, the Administrator has acquired electric power pursuant to section 6 may not be restricted below the amount of electric power so acquired from, or on behalf of, such customer. If in any year such customer's requirements are less than such entitlement, any excess of such entitlement shall be first made available to increase the entitlement of other customers of the same class before being available for the entitlement of other customers. For purposes of this paragraph, the following entities shall each constitute a class;
>
> (A) public bodies and cooperatives;
>
> (B) Federal agencies;
>
> (C) direct service industrial; and
>
> (D) investor owned utilities.

Pacific Northwest Electric Power Planning and Conservation Act of 1980 - Continued Preference for Cooperative Customers - 16 U.S.C. 839g(c)

> **(c) Statutory preferences and priorities of public bodies and cooperatives in sale of federally generated power.** Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

Pacific Northwest Electric Power Planning and Conservation Act of 1980 - Congressional Declaration of Purpose - 16 U.S.C. § 839

The purposes of this Act, together with the provisions of other laws applicable to the Federal Columbia River Power System, are all intended to be construed in a consistent manner. Such purposes are also intended to be construed in a manner consistent with applicable environmental laws. Such purposes are:

(1) to encourage, through the unique opportunity provided by the Federal Columbia River Power System –

(A) conservation and efficiency in the use of electric power, and

(B) the development of renewable resources within the Pacific Northwest;

(2) to assure the Pacific Northwest of an adequate, efficient, economical, and reliable power supply

(3) to provide for the participation and consultation of the Pacific Northwest States, local governments, consumers, customers, users of the Columbia River System (including Federal and State fish and wildlife agencies and appropriate Indian tribes), and the public at large within the region in –

(A) the development of regional plans and programs related to energy conservation, renewable resources, other resources, and protecting, mitigating, and enhancing fish and wildlife resources,

(B) facilitating the orderly planning of the region's power system, and

(C) providing environmental quality;

(4) to provide that the customers of the Bonneville Power Administration and their consumers continue to pay all costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements, including the amortization on a current basis of the Federal investment in the Federal Columbia River Power System;

(5) to insure, subject to the provisions of this Act –

(A) that the authorities and responsibilities of State and local governments, electric utility systems, water management agencies, and other non-Federal entities for the regulation, planning, conservation, supply, distribution, and use of electric power shall be construed to be maintained, and

(B) that Congress intends that this Act not be construed to limit or restrict the ability of customers to take actions in accordance with other applicable provisions of Federal or State law, including, but not limited to, actions to plan, develop, and operate resources and to achieve conservation, without regard to this Act; and

(6) to protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially

obtainable from the management and operation of the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.

Atomic Energy Act of 1954 - Payments in Lieu of Taxes - 42 U.S.C. § 2208

> In order to render financial assistance to those States and localities in which the activities of the Commission are carried on, and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment.

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No. 89-364

In The

Supreme Court of the United States

October Term, 1989

PACIFIC POWER & LIGHT COMPANY, et al.,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

MOUNTAIN STATES LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* IN SUPPORT OF WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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MOUNTAIN STATES LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

Pursuant to Rule 36 (.1) of the Supreme Court Rules, Mountain States Legal Foundation (MSLF) respectfully requests that this Court grant it leave to file the attached brief *amicus curiae* in support of the Petition For Writ of Certiorari to the Montana Supreme Court filed by the Petitioners.[1] Consent for the filing of this brief has been

[1] Petitioners are Pacific Power & Light Company, Portland General Electric Company, Puget Sound Power & Light Company, The Washington Water Power Company and The Montana Power Company.

obtained from counsel for the Petitioners, however, permission from counsel for the Montana Department of Revenue, was requested by telephone and denied.

In support of this motion, MSLF states as follows:

1. MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberty, the right to own and use property, and the free enterprise system. MSLF takes great interest in questions of law having national scope and especially those that have a direct impact in the Mountain States region, including the States of Montana, Oregon, Washington, and Wyoming where the incidence of the challenged tax will rest.

2. Many MSLF members are consumers of the electricity which is transmitted by the Bonneville Power Administration (BPA) over its federal electric transmission grid called the Federal Columbia River Transmission System (FCRTS), created by an Act of Congress.[2] Petitioners herein are five investor-owned utilities that own generating facilities in Southeastern Montana, at Colstrip. Petitioners have entered into "wheeling" agreements with BPA. With the exception of Montana Power Company, most of Petitioners' customers are residents of Oregon, Washington, and Wyoming and have no representatives in the halls of the Montana Legislature, nor can they participate in the elections for Montana's

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[2] 16 U.S.C. Section 838b

District Court Judges and Supreme Court Justices. In *American Oil Co v. Neill*, 380 U.S. 451, 455 (1965), this Court held:

> When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. (citing cases) This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax.

The tax now under scrutiny will ultimately be borne by the customers of Petitioners, most of whom reside in the States of Oregon, Washington, and Wyoming. Because those customers have no representation in the Montana Legislature, this amounts to "taxation without representation."

3. The State of Montana has imposed a beneficial-use tax on Petitioners for transmission lines constructed, owned, operated, and used exclusively by a federal authority, BPA, to provide service pursuant to Congressional Authority. The incidence of the tax falls on residents of other states, Oregon, Washington, and Wyoming, and has far reaching ramifications for the residents of every state who face the possibility that one state will tax federal property used in interstate commerce which has the effect of passing the tax to residents of those other states. MSLF seeks to present to this Court fundamental policy considerations regarding the adverse impact the Montana Statute and the decision of the Montana Supreme Court have on the residents of Oregon, Washington, and Wyoming.

4. The residents of Oregon, Washington, and Wyoming, who will suffer the adverse impact of the illegal imposition of the tax, have not had an opportunity to be heard in previous proceedings and this Court is the only tribunal which will have an opportunity to review this matter on behalf of the residents of Oregon, Washington, and Wyoming.

5. Further there is a Substantive Due Process problem with the tax as applied by the Department of Revenue for the State of Montana and allowed by the Montana Supreme Court. The taxation of federally constructed, owned, operated, and used facilities, such as in the instant case, is directly contrary to the holding of this Court in *M'Culloch v. The State of Maryland, et.al.*, 17 U.S. 316 (1819), 4 Wheaton 479. In *M'Culloch* this court held:

> If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights. . . .

The "wheeling" contracts between Petitioners and BPA require BPA to provide electrical power to Petitioners over BPA's facilities. BPA uses its facilities to fulfill its contract with Petitioners. The Petitioners contract for BPA's services cannot give rise to a "beneficial use" tax anymore than an agreement by a citizen of Oregon with the U.S. Postal service to send a package to a resident in Montana can give rise to a beneficial-use tax. The party using the mail service contracts with the U.S. Postal Service to deliver the package and the Postal Service uses its own facilities and methods to fulfill the contract. There

can be no tax on the agreement for postal services by the postal patron and in the same sense there can be no tax on Petitioners' contracts for BPA's services.

6. These considerations, while directly applicable to the instant case, transcend the specific interests of the existing parties, and thus may not be adequately addressed by these parties.

For the foregoing reasons, MSLF respectfully requests that its motion for leave to file the attached brief *amicus curiae* be granted.

DATED this 29th day of September, 1989

Respectfully submitted,

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No. 89-364

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On Petition For A Writ Of Certiorari To
The Montana Supreme Court

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT 4

I. THE STATE OF MONTANA HAS NO AUTHORITY TO TAX FEDERAL FACILITIES LOCATED IN THE STATE OF MONTANA 4

II. OREGON, WASHINGTON, AND WYOMING RESIDENTS UPON WHOM THE TAX RESTS, HAVE NO EFFECTIVE REPRESENTATION, EXCEPT BEFORE THIS HONORABLE COURT..... 7

CONCLUSION 11

TABLE OF AUTHORITIES

Pages

CASES

American Oil Co. v. Neill, 380 U.S. 451 (1965) 8

M'Culloch v. The State of Maryland, 17 U.S. (4 wheat.) 316 (1819) 3, 6

Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) 5

United States v. County of Fresno, 429 U.S. 452 (1977) 2, 5, 8

Wilkinson v. Confederated Tribes and Bands of Yakima Indian Nation, et al., ___ U.S. ___, 87-1697, 57 U.S.L.W. 4999 9

Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) ..9, 11

STATUTE

16 U.S.C. Section 838b 2, 4

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Respondents.

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

The Mountain States Legal Foundation (MSLF) respectfully submits this brief *amicus curiae* in support of the Petitioners[1] for certiorari.

INTEREST OF AMICUS CURIAE

The Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the

[1] Petitioners are Pacific Power & Light Company, Portland General Electric Company, Puget Sound Power & Light Company, The Washington Water Power Company, and The Montana Power Company.

defense and preservation of individual liberties, private property rights, and the free enterprise system. MSLF takes great interest in questions of law having national scope and especially those that have a direct impact in the Mountain States region, including the States of Montana, Oregon, Washington and Wyoming where the incidence of the challenged tax will rest.

Many of the MSLF members are consumers of electricity transmitted by the Bonneville Power Administration (BPA) over its federal electric transmission grid called the Federal Columbia River Transmission System (FCRTS), which system was created by an Act of Congress.[2] The grid of transmission lines was constructed and is owned, operated, and used exclusively by BPA, a federal authority. Petitioners have "wheeling" contracts with BPA for transmission of firm power to Petitioners' facilities in Montana, Oregon, Washington, and Wyoming. As a result of these contracts, the State of Montana has imposed a tax on Petitioners for the property used by BPA to provide contractual services to Petitioners. Only the Montana Power Company has most of its customers in the State of Montana. Most of the customers of the other Petitioners are located in states other than the State of Montana, including Oregon, Washington, and Wyoming, and those customers have no "political check against the abuse of the power to tax" by the Montana Legislature. *United States v. County of Fresno*, 429 U.S. 452, 458. Petitioners agree the taxes are unconstitutional since citizens of Oregon, Washington, and Wyoming have not

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[2] 16 U.S.C. Section 838b

been represented in the political decision to levy a tax upon them. MSLF seeks to enter this action on behalf of the citizens of Montana, Oregon, Washington, and Wyoming and requests that this Honorable Court review the tax and the decision by the Montana Supreme Court.

MSLF is further interested in this matter because the State of Montana is attempting to tax facilities which were constructed by a federal authority and are now owned, operated, and used exclusively by that same federal authority. This Honorable Court has held that a state may not tax federal facilities which are owned, operated, and used exclusively by the federal government. *See M'Culloch v. Maryland*, 17 U.S. (4 wheat.) 316 (1819). By passing this particular statute, the State of Montana seeks to tax federal facilities contrary to the public policy sought to be achieved by the creation of FCRTS and BPA. The tax has been upheld by the Montana Supreme Court despite the fact that it is in direct derogation of the *M'Culloch* decision.

STATEMENT OF THE CASE

Amicus Curiae adopts Petitioners' statement of the case.

REASONS FOR GRANTING THE WRIT

I. THE STATE OF MONTANA HAS NO AUTHORITY TO TAX FEDERAL FACILITIES LOCATED IN THE STATE OF MONTANA

Congress gave the Bonneville Power Administration (BPA) authority to " . . . operate and maintain the Federal transmission system within the Pacific Northwest and shall construct improvements, betterments, and additions to and replacements of such system within the Pacific Northwest as . . . are appropriate and required to . . . (a) integrate and transmit the electric power from existing or additional Federal or *non-Federal generating units*; . . . [and] (c) provide *interregional transmission facilities*."[3] (Emphasis supplied)

Pursuant to that mandate of Congress, BPA constructed, owns, maintains, and operates the "Montana Intertie" as well as other facilities in Montana used to "transmit electric power from . . . non-Federal generating units," namely Colstrip Units 3 and 4. These generating units are important because they "represent the largest single source of coal-fired generation in the Pacific Northwest, other than the Jim Bridger generating plants in Wyoming."[4] Because electricity generated at the Colstrip Units 3 and 4 is transmitted over BPA's facilities, Montana seeks to impose a tax on Petitioners.

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[3] 16 U.S.C. sec. 838b

[4] Brief in Opposition to the Petition for Writ of Certiorari to the Montana Supreme Court in *Portland General Electric Co. v. The Department of Revenue of the State of Montana*, Supreme Court Docket No. 89-266 at page 3.

The Montana Supreme Court in its decision affirming the lower court in this action cited *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 127 (1906), wherein this Honorable Court stated:

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of someone on his behalf.

It cannot be argued that Petitioners are enjoying or using BPA's property. BPA, pursuant to its Congressional Mandate, has *exclusive* enjoyment and use of its property. This Honorable Court in *United States v. County of Fresno*, 429 U.S. 452, 462, stated:

> These cases make clear that a state may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being *used* by a private citizen or corporation and so long as it is the *possession or use by the private citizen that is being taxed.* (Emphasis supplied)

Petitioners *do not have* possession of or use of the BPA's facilities located in the State of Montana. Montana is trying to tax Petitioners for property they do not use. Petitioners have contracts with BPA which require BPA – in accordance with the public policy enacted in federal statute – to use its facilities to provide power to Petitioners in the Pacific Northwest. The power itself can

come from any of a number of sources which are connected to FCRTS. Therefore, the power may be from Washington, Oregon or any other source which is connected to FCRTS.

Petitioners' contract rights, referred to by the Montana Supreme Court to justify the imposition of the tax on them for BPA's property, is no different than the contract right every private citizen has in the facilities (trucks, buildings, etc.) of the U.S. Postal Service. An individual placing a letter or package in the U.S. mail makes a contract with the Postal Service that the letter will be delivered as addressed. The citizen pays for the service and the Postal Service may have to construct or purchase additional facilities to fulfill its contract. The contract between the private individual and the U.S. Postal Service gives rise to court "enforceable" rights in the individual. But if the reasoning of the Montana Supreme Court is extended to the point that the *"use"* made by a private individual of the U.S. Postal Service facilities gives rise to a "beneficial use" tax, then all property of the U.S. Postal Service used to deliver the mail to each individual is subject to a comparable tax. This result is directly contrary to the decision of this Court in *M'Culloch v. The State of Maryland, et al.*, 17 U.S. (4 wheat.) 316 (1819). In *M'Culloch*, this Honorable Court specifically held that postal facilities would not be subject to a tax even though the Postal Service uses its facilities to serve the "enforceable contract rights" of the individual. The State of Montana may not constitutionally tax BPA's facilities.

II. OREGON, WASHINGTON, AND WYOMING RESIDENTS UPON WHOM THE TAX RESTS, HAVE NO EFFECTIVE REPRESENTATION, EXCEPT BEFORE THIS HONORABLE COURT

Because Montana is applying an unconstitutional tax on federally owned, operated, and maintained facilities, the residents of the States of Oregon, Washington, and Wyoming have no way to challenge the tax except before this Honorable Court.

This country was founded on the principle that those who are governed must have a say in those who govern and the decisions they make. In other words, there must be representation in all aspects of government, particularly those decisions involving taxes since the power to tax is the power to destroy. The Declaration of Independence states:

> . . . governments are instituted among men, deriving their *just powers* from the *consent* of the governed. . . . (Emphasis Supplied)

In setting forth the facts giving rise to the Declaration of Independence, the drafters stated:

> He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature – a right inestimable to them and formidable to tyrants only. . . .

The drafters were particularly upset with the King "for imposing taxes on us without our consent. . . ."

The framers of the Declaration of Independence recognized the critical importance of representation by those governed. They were particularly concerned about the

imposition of taxes without proper representation. The principles espoused in the Declaration of Independence are protected by the United States Constitution. The Constitution provides for equal protection under the laws, including representation.

In the case at bar, the State of Montana seeks to impose beneficial use taxes on the residents of Oregon, Washington, and Wyoming by imposing said tax on the Petitioners because of the alleged "use" by Petitioners of transmission facilities constructed, owned, operated, and used exclusively by a federal authority, BPA.

Although the tax is ostensibly imposed upon Petitioners, the tax ultimately falls on their customers who are mostly residents of Oregon, Washington, and Wyoming. This Honorable Court in *American Oil Co. v. Neill*, 380 U.S. 451, 455, held:

> When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. (Citing cases) This approach requires us to determine the ultimate effect of the law as applied and enforced by a state or, in other words, to find the operating incidence of the tax.

The decision of the Montana Supreme Court and the tax in question are particularly onerous because there is no "political check against abuse of the power to tax" because the most persons upon whom this tax falls have no right or voice in the governmental process. *United States v. County of Fresno*, 429 U.S. 452, 458-459 (1977).

The issue of legislation without representation has arisen in the context of the Indian tribes and tribal government. Most recently this Honorable Court discussed that issue in *Wilkinson v. Confederated Tribes and Bands of Yakima Indian Nation, et al.*, ___ U.S. ___, 87-1697, 57 U.S.L.W. 4999. Justice Stevens, in discussing the authority of the Indian tribe to determine the character of land owned predominantly by non-Indians, stated:

> Moreover, its is unlikely that Congress intended to give the tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent eighty percent of the population yet lack a voice in tribal governance.

The framers of the Constitution and Declaration of Independence recognized the importance of protecting the "voice" of the governed in legislation. To paraphrase Justice Stevens, it is unlikely that the framers of the Constitution intended that Montana have the right to impose a tax which falls mostly on Oregon, Washington, and Wyoming residents when they "lack a voice in [Montana] governance."

In *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444, this Honorable Court held:

> That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities, and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

All of the facilities owned, operated, and used by Petitioners in the State of Montana are taxed as are the facilities of any other private individual or corporation. But in this particular case, the State of Montana attempts to impose a tax on transmission facilities that are owned, operated, and exclusively used by the federal government, namely the BPA. Those facilities are not owned or used by Petitioners. There is no protection, opportunity or benefit given to Petitioners by the State of Montana for which the tax can be exacted. In other words, there is no nexus or relationship between the tax imposed by the State of Montana and any opportunity, benefit or protection provided to Petitioners by the State of Montana. Because there is no connection between the protection provided, the State of Montana is in essence taking the property of Petitioners without due process of law, which violates the Fourteenth Amendment.

The same argument would apply to the residents of the States of Oregon, Washington, and Wyoming who are the consumers of the electricity. The State of Montana provides no protection, benefit or opportunity to the residents of Oregon, Washington, and Wyoming. The "protection, benefit, and opportunity" if any, are provided only to the BPA. As BPA is a federal facility, "protection, benefit, or opportunity" is being provided by federal agencies. Because federal agencies provide the necessary "protection, benefit, or opportunity" to BPA, BPA creates no burden for the State of Montana which would give rise to the tax on BPA facilities. The State of Montana is attempting to take property of the residents of Oregon, Washington, and Wyoming without due process of law, which violates the Fourteenth Amendment.

Because there is "no political check to the abuse of the taxing power" (*County of Fresno*, 429 U.S. at 458) for

residents of Oregon, Washington, and Wyoming and there is no "protection, opportunities, and benefits . . . for which [Montana] can ask return," the tax is unconstitutional. (*Wisconsin v. J.C. Penney Co.*, 311 U.S. at 444).

CONCLUSION

The State of Montana has no authority to impose a tax on federal facilities that are constructed, owned, operated, and maintained pursuant to an Act of Congress. Montana is attempting to impose a tax on citizens of other states by illegally taxing federal facilities. Petitioners do not have "possession of" or "use of" those federal facilities.

The residents of Oregon, Washington, and Wyoming have no "voice" in the Montana governance or "political check against the abuse of the power to tax" by the State of Montana as guaranteed by the Fourteenth Amendment. This amounts to taking their property without Due Process. Accordingly, this Honorable Court should grant the Writ of Certiorari and reverse the ruling below.

Respectfully submitted,

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